(14)

No. 97-1536-CSX Title: Arizona Department of Revenue, Petitioner
v.
Blaze Construction Company, Inc.

Docketed: March 18, 1998 Court: Court of Appeals of Arizona, Division One

Entry	Date	Proceedings and Orders
	Mar 16 1998	Petition for writ of certiorari filed. (Response due April 17, 1998)
	Apr 16 1998	Brief of respondent Blaze Construction Company, Inc. in opposition filed.
	Apr 28 1998	DISTRIBUTED. May 14, 1998
	May 18 1998	Petition GRANTED. SET FOR ARGUMENT December 8, 1998. **********
	Jun 9 1998	Order extending time to file brief of petitioner on the merits until July 15, 1998.
	Jun 29 1998	Joint appendix filed.
	Jul 13 1998	Order extending time to file brief of petitioner on the merits until July 20, 1998.
	Jul 20 1998	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Jul 20 1998	Brief amicus curiae of United States filed.
	Jul 20 1998	Brief of petitioner Arizona Department of Revenue filed.
	Jul 20 1998	Brief amici curiae of California, et al. filed.
	Aug 20 1998	Brief of respondent Blaze Construction Company, Inc. filed.
	Aug 20 1998	Brief amicus curiae of Gila River Indian Community filed.
	Aug 20 1998	Brief amici curiae of Frank Adson, et al. filed.
	Aug 20 1998	Brief amicus curiae of San Carlos Apache Indian Tribe filed.
	Aug 20 1998	Brief amicus curiae of Navajo Nation filed.
	Aug 31 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 22 1998	Reply brief of petitioner Arizona Department of Revenue filed.
	Sep 24 1998	Response of respondents to motion of the Solicitor General for leave to participate in oral argument and for divided argument filed.
	Oct 5 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 22 1998	Record filed.
	Oct 30 1998	Record filed.
	Nov 2 1998	CIRCULATED.
	Dec 8 1998	ARGUED.

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No. _____

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Arizona Court Of Appeals, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state tax on a contractor doing business with the United States on an Indian reservation pre-empted when Congress has not expressly provided for such pre-emption and there is no infringement on tribal sovereignty because no tribal funds are used and no tribe is a party to the contract?

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona ex rel. Arizona Department of Revenue ("State") respectfully petitions for a writ of certiorari to review the judgment that the Arizona Court of Appeals, Division One, entered in this case on April 29, 1997.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at 947 P.2d 836 (Ariz. App. 1997). Appendix ("App.") 1. The Arizona Supreme Court's order denying review, with one justice voting to grant review, is unreported. App. 27. The Arizona Tax Court's judgment and minute entry order are unreported. App. 28-29.

STATEMENT OF JURISDICTION

On April 29, 1997, the Arizona Court of Appeals, Division One, entered the judgment from which review is sought. On December 16, 1997, the Arizona Supreme Court denied the petition for review. App. 27. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS

The Appendix contains pertinent portions of the Arizona Transaction Privilege Tax, Ariz. Rev. Stat. §§ 42-1306, 42-1310.16 (App. 30); the Buy Indian Act, 25

U.S.C. § 47 (App. 33); the Federal Lands Highway Program, 23 U.S.C. § 204 (App. 34); and relevant portions of regulations of the Department of the Interior's Bureau of Indian Affairs governing road construction, 25 C.F.R. §§ 170.1-170.19 (App. 37), and self-determination contracts, 25 C.F.R. §§ 271.1-271.5 (App. 39).

STATEMENT OF THE CASE

While purporting to follow federal law, the court of appeals' opinion actually disregards that law by reading into this Court's decisions a requirement that a state may not tax commercial transactions occurring on Indian reservations between non-Indians unless there is a "direct connection" between state services and the taxed activity. That requirement contravenes this Court's long-standing principle that a state law will apply within an Indian reservation unless it interferes with tribal self-government or impairs a right granted or reserved by federal law, and replaces it with an unpredictable test that is completely divorced from the controlling question of whether Congress intended to pre-empt state taxation. In arriving at its far-reaching conclusions, the court of appeals acknowledged that its decision squarely conflicts with decisions of the New Mexico Supreme Court and the Ninth Circuit Court of Appeals. App. 8-9, 20-23. The decision also conflicts with this Court's decisions by, among other things, extending the cloak of tax immunity enjoyed by tribes to non-members and the federal government and ignoring the central role that tribal sovereignty plays in pre-emption analysis. The court of appeals also found congressional intent to pre-empt state

taxes in federal interests that are considerably weaker and statutes that are considerably less explicit than ones this Court has found do not establish pre-emption. Finally, the conflicting decisions place businesses that contract with the federal government on reservations throughout the country in the untenable position of guessing whether their transactions are subject to state taxation, and render their federal employer unable to eliminate their uncertainty because the lower courts are hopelessly divided. For these reasons, this Court should review the decision and remove the confusion it creates regarding this important issue of federal law.

A. Material Facts.

The State maintains a highway system across Arizona, including Indian reservations. The State built and maintains the principal highways of the reservations (App. 19), but the Bureau of Indian Affairs ("BIA") builds and maintains other roads that feed into the state's system. Once built, all BIA roads still belong to the federal government and must remain open to the public. 23 U.S.C. § 101(a); 25 C.F.R. § 170.8(a) ("Free public use is required on roads eligible for construction and maintenance with Federal funds under this part.").

Respondent, Blaze Construction Co., Inc. ("Blaze"), engaged in contracting activity within Arizona. App. 2. The BIA, an agency of the United States, awarded Blaze contracts to construct and repair roads on six Indian reservations located across Arizona. App. 3. The parties entered into the contracts pursuant to the Federal Lands Highways Program, which authorizes the Secretary of

Transportation to establish a coordinated program for highway construction on a variety of federal lands, including forest highways, public lands highways, and Indian reservation roads. 23 U.S.C. § 204. While some of Blaze's projects were in remote locations, many connected to or were near highways that the State maintains, and thus are essentially part of the same highway system.

Blaze transports equipment and personnel over hundreds of miles of State highways to get to its projects scattered throughout Arizona. App. 4. While Blaze pays vehicle fees and use fuel taxes for its off-reservation use of State highways, these fees and taxes go to road maintenance, not to the costs of general government. Ariz. Const. art. 9, § 14.

The State provides many services on reservations in addition to road maintenance. For example, it spends over $100,000,000 each year on elementary and secondary schools that serve on-reservation Indians. App. 19. These education services benefit Blaze and its tribal-member employees, as do other on-reservation services that the State provides, such as law enforcement, social services, and child support enforcement. Indeed, the court of appeals recognized that the State furnishes substantial services to Blaze and tribal members. *Id.*

B. Proceedings Below.

The State initiated an action in the Arizona Tax Court to enforce a transaction privilege tax assessment against Blaze. The Tax Court entered judgment for the State, holding that federal law does not pre-empt a state tax on a contractor doing business with the federal government

on an Indian reservation. App. 28. The Arizona Court of Appeals reversed, holding that a state tax on construction contracts with a federal agency for work done on an Indian reservation must be analyzed using the implied pre-emption principles that this Court has applied to the activities of non-Indians on reservations. App. 5-9. In doing so, the court of appeals rejected the State's argument that state taxation of the federal contracts here should be analyzed under the principles that generally apply to the taxation of federal contractors – namely, that a state tax will be pre-empted only if it is imposed directly on the federal government or if a federal statute expressly preempts it. *See United States v. New Mexico*, 455 U.S. 720 (1982). The court of appeals also rejected the New Mexico Supreme Court's reasoning in an identical case that involved the same taxpayer, *Blaze Construction Co. v. Taxation & Revenue Department*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 514 U.S. 1016 (1995), which held that a clear expression of congressional intent to pre-empt a state's tax is required when the federal government is a party to the taxed contract.

In applying the implied pre-emption test, the court of appeals found congressional intent to preempt the State tax in the Buy Indian Act (25 U.S.C. § 47), which establishes a contracting preference for any Indian (Blaze is owned by a member of an Indian tribe located outside Arizona[1]) (App. 13, 15-16), and in BIA regulations

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[1] Blaze's ownership by an Indian is not decisive here because this Court has held that a non-member Indian stands on the same footing as a non-Indian for state tax purposes. *See Washington v. Confederated Tribes of the Colville Indian Reservation,*

concerning construction of reservation roads and implementation of the Indian Self-Determination and Education Assistance Act (25 C.F.R. §§ 271.1-271.5) (App. 12-13, 15-16). The court of appeals found that these federal policies were similar to those found preemptive in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), yet failed to recognize that in *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989), this Court upheld a state tax in the face of considerably stronger federal interests and more comprehensive statutes.

The court of appeals attempted to distinguish *Cotton Petroleum*, in which this Court upheld a state tax on a non-Indian lessee's oil and gas production, by holding that a state can only tax non-Indian activities on a reservation when there is a direct connection between the taxed activity and state services or regulation. The lower court used this holding to distinguish the numerous Arizona and federal cases that had specifically upheld taxes on non-tribal members or on transactions that did not involve tribes or tribal members.

The State filed a petition for review with the Arizona Supreme Court. The court denied the petition on

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447 U.S. 134, 160-1 (1980); *see also Duro v. Reina*, 495 U.S. 676, 686 (1990) ("Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class.").

December 16, 1997, with Justice Martone voting to grant review. App. 27.

REASONS TO GRANT THE PETITION

The court of appeals' opinion interjects new confusion into the already murky area of state taxation on Indian reservations. Other courts have correctly applied this Court's decisions by focusing on the identities of the parties engaged in commercial transactions on Indian reservations, recognizing that Congress and this Court have acted to protect tribes and tribal members from the reach of state taxes, but have not acted to similarly protect non-tribal members. By relying on amorphous federal interests expressed in statutes and regulations unrelated to issues of state jurisdiction, the court of appeals' opinion undermines this Court's attempts to provide doctrinal clarity to this area. This Court should grant review and clarify that federal law does not prohibit State taxes on commercial transactions between non-tribal members.

1. The Arizona Opinion Directly Conflicts with a New Mexico Supreme Court Decision as to an Issue of Federal Law.

The Arizona Court of Appeals and the New Mexico Supreme Court have reached opposite conclusions in cases involving the same federal contractor, Blaze, on the same issue of federal law. *Blaze Construction Co. v. Taxation & Revenue Dep't*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 514 U.S. 1016 (1995). The Arizona Court of Appeals

acknowledged this conflict and expressly disagreed with the New Mexico Supreme Court. App. 8-9, 21-23. Under these conflicting decisions, a tax on a contractor building a road for the BIA on the Navajo Reservation that begins in New Mexico and extends into Arizona would be pre-empted in Arizona but not in New Mexico, because the courts of these two adjoining states have issued diametrically opposed interpretations of federal law. This issue will arise in all states that contain Indian reservations, and federal contractors will have no way of knowing in advance whether they are subject to state taxation. *See also Matter of State Motor Fuel Tax Liab.*, 273 N.W.2d 737 (S.D. 1978) (federal law does not pre-empt a state fuel tax imposed on BIA road contractor). This Court alone can eliminate the confusion by speaking with authority on this important issue of federal law.[2] This Court should grant the petition to resolve the direct conflict between the courts of Arizona and New Mexico.

2. The Arizona Opinion Conflicts with Ninth Circuit Court of Appeals Decisions as to an Issue of Federal Law.

The court of appeals' holding that a state tax on reservation transactions that do not involve any tribe or

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[2] The issue continues to generate litigation in New Mexico, in part because the Arizona decision gives federal contractors hope that the New Mexico decision may be overturned. *See Centex Bateson Constr. Co. v. Department of Taxation & Revenue*, Docket No. 97-99, *cert. denied*, 118 S. Ct. 167 (1997) (taxpayer cited Arizona opinion in challenging New Mexico court rulings upholding a tax on a contractor building a hospital on an Indian reservation for the United States Department of Health and Human Services).

tribal member is permissible only if there is a "direct connection" between state services and the taxed activity also conflicts with the reasoning of recent decisions of the Ninth Circuit Court of Appeals. *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996) ("The Tribe's insistence that there be a direct connection between the state sales tax revenues and the services provided to the Tribe is similarly meritless."). In *Gila River*, the Ninth Circuit upheld a state tax on the sale of entertainment services by non-Indians to non-Indian customers. While state services such as law enforcement and traffic control facilitated the taxed activities, there was no "direct connection" between the tax and the services. *See also Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 853 (1998) (citing *Gila River* to reject proposition that a tax on transactions between non-Indians must be "narrowly tailored" to services provided to the reservation). The Arizona Court of Appeals attempted to distinguish *Gila River* in its opinion. App. 20-21. While the Ninth Circuit correctly held that state services are entitled to little weight in determining whether a state may impose a tax on commercial transactions involving only non-Indians, the Arizona court made the requirement of a direct connection between state services and the taxed activity the linchpin of its analysis. The reasoning of the court of appeals conflicts with decisions of the Ninth Circuit. This Court should grant the petition to resolve the conflict.

3. This Court Has Never Applied the Implied Pre-emption Doctrine to Bar State Taxation of Federal Contractors Who Happen to Do Work on Indian Reservations.

The court of appeals erred in holding that express pre-emption is not necessary to bar a state tax on federal contractors when the tax is imposed on a contractor who is doing work on an Indian reservation. In the area of taxation, federal law bars a state tax only if the tax is imposed directly on the federal government or if the language of the relevant statute expressly preempts it. *United States v. New Mexico*, 455 U.S. 720 (1982).

The court of appeals found that the implied pre-emption doctrine that applies in cases involving Indians should apply in cases involving federal contractors doing business on reservations because this Court has never stated otherwise. App. 5-9. It failed to recognize, however, that federal contracts are different from any other taxed activity, because one of the parties to the contract – the United States – can unilaterally exempt itself and its contractors from any state tax. In prior cases, this Court has extended the tax immunity that tribal members enjoy to non-members doing business on the reservation not because of any implied congressional intent to protect non-members, but because of its recognition that in certain circumstances the state tax was effectively, albeit indirectly, a tax on the tribe or tribal member. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 842 (1982). This Court's early formulation of the doctrine in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), explains why the doctrine is limited to those

who are dealing with tribes. In *McClanahan*, this Court made clear that what distinguishes Indian pre-emption from general pre-emption is that "Indian sovereignty . . . provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172.[3]

Moreover, the court of appeals failed to grasp what the New Mexico Supreme Court understood from this Court's decisions – namely, that the identity of the contracting parties is of central importance in any Indian law analysis. When a contract involves only the federal government and a non-member of the tribe, tribal sovereignty is not affected. Moreover, federal interests do not need the protection of the implied pre-emption doctrine because the federal government can protect itself and its contractors directly, rather than by implication. The court of appeals failed to recognize that because the Indian pre-

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[3] If there is no tradition of tribal sovereignty or tribal immunity from state law with regard to a particular activity, tribal interests do not bar state jurisdiction. *Cotton Petroleum*, 490 U.S. at 182 ("There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read."); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("If, however, we do not find such a tradition, . . . our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty."); *see also Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997), *quoting Montana v. United States*, 450 U.S. 544, 565 (1981) ("In the main, the Court explained, 'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.' ").

emption doctrine's purpose is to protect tribal sovereignty, the doctrine does not apply to situations in which sovereignty is not affected, such as when the taxed transaction is between the federal sovereign and a non-member of the tribe.[4]

If Congress wishes to pre-empt state taxes on federal contractors who do work on Indian reservations, it can easily do so.[5] Its failure to do so leaves in place the general rule that state taxes on federal contractors are permissible unless Congress expressly pre-empts them.

4. The Arizona Opinion Conflicts with this Court's *Cotton Petroleum* Decision by Requiring a State to Show a Direct Connection Between State Services and the Activities Taxed, Even When the Activities Do Not Involve Any Tribal Members.

The essential underpinning of the court of appeals' opinion is that there must be a *direct* connection between

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[4] Indeed, this Court's precedents support a rule that state taxes on commercial transactions between non-tribal members are presumed to be valid. Such a rule would be an appropriate counterpoint to this Court's rule that in the special area of state taxation of Indian tribes and tribal members, state taxes are *per se* invalid. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17 (1987); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2221 (1995) (categorical approach provides a reasonably bright-line standard which responds to the need for substantial certainty as to the permissible scope of state taxation authority).

[5] *See* 5 U.S.C. § 8909(f) (barring any state tax, fee or other monetary payment with respect to health payments made to a carrier by the United States).

state services and the specific non-Indian activity being taxed. This requirement is simply not the law. In fact, it contravenes this Court's long-standing determination that state laws are effective on Indian reservations unless their application interferes with reservation self-government or impairs a right granted or reserved by federal law. *Rice v. Rehner*, 463 U.S. 713, 718 (1983). Thus, when this Court has considered state services in its analysis it has done so to allow a state to justify the tax even in the face of strong federal and tribal interests. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state can justify the assertion of state authority.").

A state does not have to justify a tax with a showing of specific state services when the tax is imposed on a non-tribal member doing business with the United States, because the tax does not interfere with federal and tribal interests. The clear weight of authority is that a state tax on non-members, or on transactions involving only non-members, is not pre-empted even if extensive federal regulation and indirect economic effects on a tribe are present.[6]

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[6] *See, e.g., Department of Taxation v. Milhelm Attea*, 114 S.Ct. 2028 (1994) (Indian trader statutes did not prevent a State from imposing burdens on sales by wholesalers to Indian retailers who in turn sold to non-Indian consumers); *Cotton Petroleum* (upholding state tax on non-Indian lessee's oil production); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding State tax on non-member purchasers of tobacco products from tribal retailers); *Surplus*

In *Cotton Petroleum*, this Court upheld State severance taxes on a non-Indian lessee's on-reservation production of oil and gas in the face of tribal and federal interests significantly greater than those at stake here. 490 U.S. at 185. The court of appeals misread *Cotton Petroleum* when it distinguished the decision by discovering within it a firm *requirement* that a state tax is permitted only if there is a direct connection between the state services and the taxed activities. *Cotton Petroleum* specifically rejected the notion that there must be a *quid pro quo* relationship between a taxpayer and the State. *Id.* at 185 n. 15. Moreover, this Court's discussion of general services that the state provided to Cotton and the tribe shows that this Court did not limit the relevant services to those that were directly connected to the taxed activity. *Id.* at 185. Indeed, in rejecting Cotton's claim that the state tax was invalid because the amount of tax paid exceeded the value of services provided by the State, this Court held that "the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it." *Id.* at 189. Therefore, a direct connection with the taxed activity is simply not required.

While state services have been discussed as one of many factors involved in considering the tribal, federal,

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Trading Co. v. Cook, 281 U.S. 647, 651 (1930) ("[R]eservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards."); *Thomas v. Gay*, 169 U.S. 264 (1898) (territorial legislature may tax non-Indian owned cattle on Indian reservation).

and state interests at stake, whether state services are provided has only been important when the state tax is imposed on a tribe or tribal member, or on someone with whom they do business. This Court demonstrated this in its discussion of the *Ramah* and *Bracker* cases in *Cotton Petroleum*. The Court did not discuss state services in the context of analyzing congressional intent as reflected in the relevant federal laws, but only discussed them as a counterweight to the recognition that the taxes imposed in *Ramah* and *Bracker* were actually burdens on the tribes. *Id.* at 184-85. In both cases, the taxes were imposed on tribal contractors, and the taxes were passed on to the tribes. Where no tribe is a party to a transaction, the existence of state services is a factor of little import and is easily outweighed by the state's sovereign interest in exercising jurisdiction over non-tribal members within the state.

Cotton Petroleum illustrates that comprehensive federal regulation of a reservation activity, federal policy encouraging reservation economic development, and financial effects on the federal government or a tribe are not enough to pre-empt a tax on non-tribal members doing business on an Indian reservation. Moreover, this Court's analysis of congressional intent in *Cotton Petroleum* shows why the court of appeals was wrong in basing its finding of federal pre-emption on the Buy Indian Act and regulations implementing the Indian Self-Determination Act. These provisions regulate the operation of the federal government in contracting with tribes and others, but they in no way, either expressly or by plain implication, demonstrate "that Congress intended to remove all barriers to profit maximization." *Id.* at 180.

Given Congress' general acquiescence in the state taxation of federal contractors, congressional intent to establish a different rule for contractors on Indian reservations should not be implied from such amorphous expressions of congressional intent.

Because it relies on undefined congressional policies expressed in vague statutes unconnected to issues of state sovereignty and jurisdiction, the court of appeals' opinion provides little guidance to federal contractors, federal agencies, or the states as to whether federal law preempts state taxes on specific transactions. The court of appeals' opinion creates confusion by ignoring the central question – whether tribal sovereignty is affected because the state tax burdens a tribe or tribal member. It replaces the analysis grounded in this inquiry with an unpredictable structure unrelated to congressional intent. While this Court has required some balancing of tribal, federal and state interests, it has never applied the test that the court of appeals devised, which ultimately looks not at tribal sovereignty, but at whether the court thinks the tribes and the federal government might be better off if there were no state tax. *Cotton Petroleum* makes it clear that this is not the law, and that a state's sovereign interest in exercising jurisdiction throughout its territory will not be set aside based on such vague and undefined federal interests.

The general rule that federal contractors are taxable by the state should be recognized throughout the nation, unless Congress provides otherwise "either expressly or by plain implication." *Cotton Petroleum*, 490 U.S. at 175-6, 189 ("Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over

all of Cotton's leases."). Congress has not done so here, a controlling fact ignored by the court of appeals.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 16, 1998

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel., ARIZONA DEPARTMENT OF REVENUE, Plaintiff-Appellee, v. BLAZE CONSTRUCTION COMPANY, INC., Defendant-Appellant.	1 CA-TX 96-0010 DEPARTMENT T OPINION (Filed: Apr. 29, 1997)

Appeal from the Arizona Tax Court
Cause No. TX 94-00549

The Honorable William J. Schafer, III, Judge

REVERSED AND REMANDED

Grant Woods, The Attorney General
by Patrick Irvine, Assistant Attorney General
Attorneys for Appellee — Phoenix

Margrave, Celmins & Verburg
by Gary Verburg
Attorneys for Appellant — Phoenix

EHRLICH, Judge

The Arizona Department of Revenue ("ADOR") assessed delinquent Arizona transaction privilege (contracting) taxes against taxpayer Blaze Construction Company. The taxes were computed on Blaze's gross proceeds from building roads for the United States Bureau of Indian Affairs ("BIA") on Indian reservations within Arizona. Blaze protested the assessment, arguing that federal law pre-empted application of the contracting tax. It prevailed in the administrative process.

ADOR then brought an action in the tax court, seeking to reinstate the assessment. On cross-motions for summary judgment, ADOR prevailed and Blaze appealed to this court, presenting the following issues:

1. Whether Blaze's pre-emption claim necessarily fails given the absence of any federal statute that expressly pre-empted the imposition of state transaction privilege taxes on the gross proceeds from work performed for BIA;

2. Whether the tax court erred in holding that federal law did not impliedly pre-empt the imposition of the tax; and

3. Whether the tax court erred in denying Blaze's claim for credit against the assessment in the amount of Arizona contracting taxes paid by its subcontractors and suppliers.

FACTS AND PROCEDURAL HISTORY

Blaze was incorporated under the laws of the Blackfeet Tribe of Oregon. *Blaze Construction Co. v. Taxation and Revenue Dep't of New Mexico*, 884 P.2d 803, 804 (N.M. 1994), *cert. denied* ___ U.S. ___, 115 S.Ct. 1359 (1995). During the audit period of June 1, 1986, through August

31, 1990, under contracts with the BIA, it provided road-paving, grading, drainage, overlayment, marking and bridge-building services at locations on six Indian reservations within Arizona, those of the Navajo, Hopi, Fort Apache, Colorado River, Tohono O'Odham and San Carlos Apache Indian Tribes. These reservation roads provided access to Indian villages, Indian residences, tribal governmental buildings and other locations used by tribal members.

Each of the road-improvement projects that Blaze undertook for the BIA was funded with Federal Highway Administration ("FHA") funds. The authorization for the funding was the Federal Lands Highway Program, 23 U.S.C. 204 (1994). That statute authorizes the United States Government to establish a coordinated program for highways on federal lands, including forest highways, public-lands highways, park roads, parkways and Indian reservation roads.

Annually, the BIA's Branch of Roads is told approximately what it will receive under the program for road construction. Over the period from 1989 to 1992, the annual figure was approximately $18 million for the Navajo area. The Navajo Nation has a roads committee that establishes priorities for roads and road-improvement projects. Using the Nation's priority list, the Branch of Roads decides the scope of each project and the amounts of money to be allocated to each. Similar procedures are presumably followed in the other areas involved in this case.

The Branch of Roads issues a specification package for each project. Based on the package, the BIA's Design

Section advertises for bids. The section maintains daily contact with the FHA concerning funding for the project. Once the FHA authorizes a particular sum for the project, the BIA awards the contract.

Several of Blaze's contracts with the BIA provided for pre-construction meetings at the BIA's Phoenix office. Blaze used state roads to transport equipment from reservation to reservation in performing its BIA contracts. It paid Arizona motor vehicle registration fees, motor carrier taxes and use fuel taxes.

The State of Arizona did not participate in planning or developing any of Blaze's projects on reservations in Arizona. It issued no permits. It provided no inspection services related to employment, construction, quality or safety. It provided no maintenance or regular law-enforcement services on any of the reservation roads on which Blaze worked. The tribes provided all of the employment-referral services for each project. Some 85% of the workers whom Blaze employed on the projects are Indians.

State highway services are funded by appropriations from the Arizona Highway User Revenue Fund, the source for which is Arizona fuel taxes. Ariz. Rev. Stat. Ann. ("A.R.S.") §§ 28-1502, 28-1557. The state also receives funds through three federal programs for highway resurfacing, rehabilitation and restoration. It receives no more or less of these funds because the roads to which they pertain pass through Indian reservations. None of the portions of reservation roads on which Blaze worked under contracts with the BIA was among those for which

the state was responsible to maintain, repair, resurface, rehabilitate or restore.

On May 21, 1993, ADOR issued a revised assessment of contracting privilege taxes against Blaze for the audit period June 1, 1986, through August 31, 1990. ADOR's hearing officer and, later, its director, rejected Blaze's protest on the merits. On administrative appeal, the Board of Tax Appeals vacated the assessment, holding that federal law pre-empted application of the contracting privilege tax to Blaze's BIA contract payments.

ADOR brought a refund action in the tax court pursuant to A.R.S. § 42-124(B) (Supp. 1996). The court held for ADOR, finding dispositive the decision in *Department of Revenue v. Hane Construction Co.*, 115 Ariz. 243, 564 P.2d 932 (App. 1977), and Blaze appealed.

DISCUSSION

A. Applicability of Indian Law Pre-emption Analysis

Blaze contends that this case is governed by the implied preemption analysis that the United States Supreme Court has repeatedly applied to assertions of state authority over the activities of non-Indians on Indian reservations. It argues that this Indian law pre-emption analysis precludes the state from imposing contracting privilege taxes on the proceeds from Blaze's BIA contracts.

ADOR's initial response is that Indian law pre-emption analysis does not apply here at all. It argues that, because Blaze's contracts were with the BIA and not the affected tribes, a more general rule applies: State taxes

will be deemed pre-empted only if they are imposed directly on the federal government or if a federal statute expressly preempts them. *See United States v. New Mexico*, 455 U.S. 720 (1982). Relying on the decision of the New Mexico Supreme Court in *Blaze Construction*, 884 P.2d 803, ADOR claims that Indian law pre-emption analysis applies only when a state attempts to assert authority over the reservation activities of non-Indians who engage directly in commerce with reservation Indians.

The Supreme Court articulated the modern formulation of Indian law pre-emption analysis in *White Mountain Apache Tribe v. Bracker*:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. [Citations omitted.] *More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.* In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. *This inquiry* is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but *has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.*

448 U.S. 136, 144-45 (1980) (emphasis added).

This formulation neither suggests nor implies that Indian law pre-emption analysis is inapplicable when the on-reservation activities of non-Indians over which the state seeks to exercise authority do not arise out of direct commercial relations with the tribe or a tribal entity. Moreover, nothing in the Court's application of that analysis in *White Mountain* suggests that it implicitly follows any such limitation. The identity of the nominal contracting party in fact played no part in the inquiry. The Court stated, for example:

> . . . Respondents [including the State of Arizona] seek to apply their motor vehicle license and use fuel taxes on Pinetop [the taxpayer] for operations that are conducted solely on Bureau [of Indian Affairs] and tribal roads within the reservation. There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, *respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.*
>
> * * *
>
> Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. That is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject. *The*

> *Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry*; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Id. at 148-49, 150-51 (emphasis added; citations and footnote omitted). The Court's sole reference to a supposed dichotomy between the BIA and the tribe indeed runs contrary to ADOR's contention here. In a footnote to the first sentence of the passage quoted immediately above, the Court stated:

> In oral argument counsel for respondents appeared to concede that the asserted state taxes could not lawfully be applied to tribal roads and was unwilling to defend the contrary conclusion of the court below, which made no distinction between Bureau and tribal roads under state and federal law. . . . For purposes of federal pre-emption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

Id. at 148 n.14.

Moreover, neither ADOR nor the New Mexico court's opinion in *Blaze Construction* attempts to identify reasoning in any of the Court's other decisions which would support an exception to Indian law pre-emption analysis founded on the absence of direct commercial relations between the taxpayer and the tribe. Both the New Mexico court and ADOR rely principally on the facts from which

those decisions happened to arise and not on their reasoning.

The New Mexico court in *Blaze Construction* further relies on the view that equating Indian tribes and the BIA improperly ignores tribal sovereignty. In our opinion, this view does not pertain analytically to the pre-emption question. It overlooks the focus of Indian law pre-emption analysis on the occurrence of non-Indian activities on an Indian reservation and the consequent potential that state taxation of those activities will conflict with federal or tribal interests reflected in federal law.

Even less to the point, ADOR argues that "[s]tate jurisdiction over tribes and tribal members can endanger the very existence of tribes, and courts will act to implement federal policy promoting the existence of tribes." ADOR forgets that the branch of Indian law pre-emption analysis that we consider here concerns assertions of state authority exclusively over non-Indians, not Indian tribes or their members.

In short, Blaze's challenge to the imposition of Arizona's transaction privilege tax on the gross proceeds from its contracts with the BIA can be resolved only by reference to Indian law pre-emption analysis as developed by the Supreme Court.

B. Application of Indian Law Pre-emption Analysis

In *Hane Construction*, the taxpayer lined canals on the Colorado River Indian Reservation in accord with a contract with the BIA. 115 Ariz. at 244, 564 P.2d at 933. ADOR assessed contracting taxes against its gross proceeds from

the job. *Id.* On ADOR's appeal from summary judgment for the taxpayer, this court reversed, holding that a balancing of the rights of the federal government, the state and the reservation Indians revealed no implied federal pre-emption of the Arizona contracting tax as applied. *Id.* at 244-246, 564 P.2d at 933-935. In the instant case, the tax court found the decision in *Hane Construction* controlling.

Blaze assails the tax court's ruling on several grounds. It contends that *Hane Construction*, which predated *White Mountain*, necessarily failed to take into account the Indian law pre-emption analysis the Supreme Court adopted in that case and applied in those that followed it. According to Blaze, only the more recent Supreme Court cases have made clear that a state's assertion of authority over non-Indians on a reservation may be pre-empted despite the absence of an express federal pre-emption provision. Further, argues Blaze, it is only of recent origin that a state must justify burdening federal and tribal interests by showing that it performs an on-reservation regulatory function in connection with the specific activity it attempts to tax. Finally, Blaze contends that, in contrast to the taxpayer in *Hane Construction*, it has identified a specific federal regulatory scheme that Arizona's contracting tax impedes and specific tribal interests that the tax burdens.

Preliminarily, *Hane Construction*, which was decided on facts and issues identical to those in this case, had never been disapproved and, therefore, it was binding on the tax court. That court correctly left to the appellate courts the question whether *Hane Construction* remained good law in light of more recent cases.

Unlike the tax court, this court is free to reexamine *Hane Construction*. Having done so, we agree with Blaze that, no matter how close in point *Hane Construction* may appear to be to this case, Indian law pre-emption analysis has evolved through too many intervening Supreme Court decisions, and the surrounding legal environment has undergone too many intervening changes, for our resolution of this appeal to rest on *Hane Construction* alone. Our analysis must consider Indian law pre-emption doctrine at its current level of development. *See, e.g., Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain*, 448 U.S. at 136.

As we noted above, to test the validity of the state's assessment against Blaze, we must engage in "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain*, 448 U.S. at 145; *accord Milhelm Attea & Bros.*, 512 U.S. at 61; *State ex rel. Dep't of Revenue v. Dillon*, 170 Ariz. 560, 564, 826 P.2d 1186, 1189-90 (App. 1991). Restated more concretely, "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *accord Arizona Dep't of Revenue v. M. Greenberg Construction Co.*, 182 Ariz. 397, 401, 897 P.2d 699, 703 (App. 1995).

The first question we thus face here is whether the state's imposition of its privilege tax on Blaze's BIA contracting payments "interferes or is incompatible with" any federal or tribal interest reflected in federal law. *Mescalero*, 462 U.S. at 334. *Blaze* argues that imposition of the tax interferes with three distinct federal policies.

Blaze compares this case with *White Mountain* and *Ramah Navajo School Bd.* and argues that it is legally indistinguishable from either. Like the statutory provisions and regulations governing Indian-controlled, on-reservation schools in *Ramah*, Blaze contends that the BIA regulations concerning construction of reservation roads reserve to that agency complete authority over on-reservation road improvement contracting, design, project selection, maintenance, use and policing. *Ramah*, 458 U.S. 832; *see generally* 25 C.F.R. 170.1 through 170.9 (1996). It argues in addition that safe, passable roads are necessary to the success of the BIA's federally-mandated efforts to provide shelter, medical services, education and other social services to reservation Indians. Indeed, contends *Blaze*, the BIA road regulations are the same ones on which the Supreme Court in *White Mountain* held that Arizona's motor vehicle fuel and use fuel taxes were federally pre-empted. It urges that the imposition of Arizona contracting privilege taxes here is incompatible with the federal and tribal interest in channeling all available funding toward building and improving reservation roads.

Blaze further contends that imposing the Arizona contracting tax on payments under the BIA road-improvement contracts directly conflicts with the BIA's regulations under the Indian Self-Determination and

Education Assistance Act, 25 C.F.R. 271.1 through 271.5 (1996). It asserts that, under ADOR's view of this case, ADOR could not have imposed the state contracting tax on Blaze if the reservations' tribal authorities rather than the BIA had let the contracts in question. It points out that 25 C.F.R. 271.4(d) and (e) express a federal policy in favor of leaving entirely to Indian tribes, free of sanctions, the decision whether to apply for contracts with the BIA to plan, conduct or administer BIA programs. *Accord* 25 C.F.R. 271.1(d). Blaze argues that allowing the imposition of state privilege taxes on non-tribal members under contract with the BIA attaches an undesirable consequence to a tribe's decision not to seek to administer construction programs in the BIA's place by effectively reducing the road-improvement services that the tribes can receive in return for the available federal funding.

Blaze finally asserts, without contradiction by ADOR, that the BIA limits bidding on reservation-road programs to Indian-owned contractors and is not permitted to accord preferences based on bidders' affiliation with the tribe that controls the reservation where the work is to be done. *See* 25 U.S.C. 47 (1994) (the Buy Indian Act). Blaze adds that ADOR has tacitly acknowledged that an Indian contractor living and working on his home reservation could not be subjected to the state contracting privilege ta[illegible] *see McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). Blaze observes that, if ADOR may thus impose the contracting tax on a non-tribal member like *Blaze* but not on a competing reservation Indian, then it effectively inserts into the reservation road-improvement process a tribal affiliation preference of the kind that federal policy forbids. Blaze contends that imposition of

the state contracting tax on non-tribal members who provide on-reservation services under contract with the BIA therefore conflicts with the BIA's implementation of the Buy Indian Act.

The unsuccessful taxpayer in *Hane Construction* made no such specific claims of incompatibility between the state's contracting tax and provisions of federal law.[1] To resolve these claims, we necessarily must go beyond the holding of that case.

ADOR answers Blaze's contentions by attempting to demonstrate that the applicable federal statutes neither express nor imply any congressional intent to pre-empt state taxation of federal contractors on Indian reservations. It notes that 23 U.S.C. 204, which established the Federal Lands Highway Program, from which the BIA obtains funding for reservation road-improvement projects, expresses an intent that all federal-roads and highways be treated under the same uniform policies. ADOR concludes from this expression of intent that Congress must have intended that federal contractors on Indian reservations be subject to state taxation to the same extent as all other federal contractors.

We disagree with this analysis. Because 23 U.S.C. 204 makes no mention of state taxation of federal contract

[1] In *Hane Construction*, the court stated: "Although the appellee here has suggested that there are federal regulations or other provisions of law which expressly conflict with the imposition of the transaction privilege tax in this case, it has called no such specific regulations to our attention." 115 Ariz. at 244, 564 P.2d at 933.

proceeds, it does not support the view that Congress intended it to address this state taxation topic.

ADOR denies that the BIA's reservation-road regulations amount to a comprehensive federal scheme into which state taxing authority may not intrude. The Supreme Court's opinion in *White Mountain* belies that view. There the Court held that Arizona's imposition of motor vehicle fuel and use fuel taxes on a company that engaged in logging and hauling on a reservation under contract with the tribe was pre-empted by the applicable federal regulatory scheme. 448 U.S. at 147-48. This scheme included the BIA's comprehensive regulations governing the harvesting and sale of tribal timber and the Secretary of the Interior's "detailed regulations governing the roads developed by the Bureau of Indian Affairs. 25 C.F.R. Part 162 (1979) [now 25 C.F.R. Part 170 (1995)]."

Further, ADOR does not directly respond to Blaze's analyses in support of its contention that imposing the Arizona contracting tax in this case conflicts with the Buy Indian Act and with the BIA's regulations under the Indian Self-Determination and Education Assistance Act. Indeed, ADOR does not address the Self-Determination Act at all. Concerning the Buy Indian Act, ADOR cites *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and the decision in *Dillon*, 170 Ariz. at 560, 826 P.2d at 1186, for the proposition that federal law permits states to treat non-members of the tribe occupying a reservation as non-Indians and therefore to tax them.

Again we disagree. The essence of the Buy Indian Act is to impose on the Secretary of the Interior, acting

through the BIA, the duty to employ Indian labor as far as practicable and to purchase the products of Indian industry in his discretion. 25 U.S.C. 47. The *Colville* and *Dillon* cases concerned on-reservation sales of cigarettes produced off-reservation by non-Indians. In neither case did the court consider how the Buy Indian Act might affect the legality of the state taxes challenged in those cases and ADOR does not attempt to explain how the facts of those cases, in which the BIA played no role at all, might have implicated the Buy Indian Act.

ADOR also disputes Blaze's contention that Arizona's imposition of the contracting privilege tax in this case adversely affected the reservation tribes' interests. It argues that Blaze's assertion that more miles of road would have been built were it not for the tax is speculative and unsupported by evidence. ADOR additionally cites *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), and our decision in *M. Greenberg Construction*, 182 Ariz. 397, 897 P.2d 699, for the proposition that a state may impose a non-discriminatory tax on a non-Indian with whom the United States Government or a tribe does business, even though the economic burden of the tax may fall on the government or the tribe. ADOR argues that, "even if there was some economic harm to the tribes here, that harm without more is insufficient to defeat the tax."

Both *Gila River*, 91 F.3d at 1237, and *Greenberg*, 182 Ariz. at 404, 897 P.2d at 706, on which ADOR relies, based their analyses on language in *Cotton Petroleum*, 490 U.S. at 163. An examination of *Cotton Petroleum*, however, reveals that ADOR misplaces its reliance on *Gila River* and *Greenberg* under the circumstances before us here.

In *Cotton Petroleum*, the Court held that a New Mexico tax on on-reservation oil production was not pre-empted under Indian law pre-emption analysis. It found that the state tax was not incompatible with the applicable federal statutes, and it distinguished both *White Mountain* and *Ramah* on the basis that the federal regulatory schemes applicable in those cases were comprehensive, the economic burden of the taxes fell on the tribes and the taxing authorities had asserted no legitimate regulatory interests that might justify the challenged taxes. However, the Court noted that the state regulated the spacing and mechanical integrity of the reservation oil wells, the production from which was subjected to the challenged tax.

> We thus conclude that federal law, even when given the most generous construction, does not pre-empt New Mexico's oil and gas severance taxes. *This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it.* Nor is this a case in which an unusually large state tax has imposed a substantial burden on the Tribe. *It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate. Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption.* To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, *absent some special factor such as those present in Bracker and Ramah Navajo School Bd.*, would be to

> return to the pre-1937 doctrine of intergovernmental tax immunity. Any adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.

490 U.S. at 186-87 (emphasis added).

In contrast to *Cotton Petroleum*, *Gila River* and *Greenberg*, this is not a case in which Arizona can correctly claim to have had anything to do with the "on-reservation activity," in this case building and improving reservation roads, other than taxing it. The BIA's road regulations, 25 C.F.R. 170.1 through 170.9, give state officials no automatic role in planning, surveying, designing, constructing, repairing, using or maintaining the BIA roads on Indian reservations. The sole reference to state participation in those processes is in 25 C.F.R. 170.7 (1995), which allows the BIA to solicit agreements for the states' voluntary cooperation in building and maintaining certain roads and bridges, "especially at those locations where road projects serve non-Indian land as well as Indian land."

The record in this case reveals no such agreement with Arizona. Further, ADOR makes no claim that the state provided regulatory or other services related to improving, maintaining or using any of the reservation roads at issue here. Instead, ADOR's position is that it need not have provided services directly related to the on-reservation activity subject to taxation to establish a state interest "sufficient to justify the assertion of State

authority." *Mescalero Apache Tribe*, 462 U.S. at 334. ADOR argues that Arizona's activities in maintaining and repairing major highways that allow access to the BIA roads, its expenditure of significant sums that assist school districts in educating reservation residents[2] and the general governmental services it provides to Blaze off the reservations, adequately established such an interest under Indian law pre-emption analysis. It relies on *Gila River*, 91 F.3d at 1232, *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir.), *cert. denied* ___U.S.___, 116 S.Ct. 186 (1995), and the New Mexico Court's decision in *Blaze Construction*, 884 P.2d at 803.

Salt River fails to support the proposition for which ADOR cites it. The contention that the Ninth Circuit rejected in that case was not that the state had to perform a regulatory function or service in connection with the on-reservation activity to acquire an interest sufficient to tax it. The taxpayer's contention was, instead, that the tax was invalid unless the state provided services to the reservation tribe that were "proportional" to the state taxes generated by the on-reservation activities. 50 F.3d at 737-38. Contrary to ADOR's implication, this contention presupposed nothing about the existence of a direct connection between the state's governmental services and the taxpayer's on-reservation activities. It promoted instead the view that, to collect the challenged state taxes, the state had to show that it provided the tribe with services of roughly equivalent value in return. The court

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[2] The state additionally provides considerable funding and many services to public school districts in Arizona, including those wholly or partly on Indian reservations.

in *Salt River* correctly rejected this contention based on language in Part IV of *Cotton Petroleum*, which addressed the taxpayer's distinct argument in that case that the tax violated the Due Process and Indian Commerce Clauses of the United States Constitution. *Salt River*, 50 F.3d at 737-738.[3]

Later on, however, summarily and without explanation, a different panel of the Ninth Circuit drew *Salt River's* analysis of the proportionality contention into its own analysis of a distinct Indian law pre-emption issue. *Gila River*, 91 F.3d at 1232, 1239. The court in *Gila River*

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[3] The Court stated:

> . . . [T]here is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer – or by those living in the community where the taxpayer is located – must equal the amount of its tax obligations.
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> * * *
>
> Cotton, in effect, asks us to divest New Mexico of its normal latitude because its taxes have "some connection" to commerce with the Tribe. The connection, however, is by no means close enough. There is simply no evidence in the record that the tax has had an adverse effect on the Tribe's ability to attract oil and gas lessees. It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases – just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements – but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation. . . .

490 U.S. at 190-91 (citations omitted).

presented *Salt River's* quotation from the Indian Commerce Clause discussion in *Cotton Petroleum* as if the court in *Salt River* had invoked that language to reject a contention in the tribe's pre-emption analysis "that there be a direct connection between the state sales tax revenues and the services provided to the Tribe . . . ." *Id.* at 1239. As we observed above, however, the tribe in *Salt River* made no such contention and the court expressed no view on that point.

The New Mexico Supreme Court employed the same misinterpretation of *Cotton Petroleum* in *Blaze Construction*, 884 P.2d at 808-09. This misunderstanding formed the basis on which the court rejected the conclusion of its intermediate appellate court that New Mexico provided insufficient regulatory or other services in connection with Blaze's on-reservation activities in that state to justify taxing Blaze's proceeds.

> The Court [of Appeals] first erred by holding that the state gross receipts tax was pre-empted because "the State has identified absolutely no interest in the [road-construction] activity." *Id.* [871 P.2d at 1371]. As part of the preemption analysis, *Bracker* and *Ramah* both held the state must identify a regulatory function or service performed that would justify the tax. *Ramah*, 458 U.S. at 843-44; Bracker, 448 U.S. at 150. Both cases held that the state's general interest in raising revenue through taxes was not sufficient justification for imposing the tax. *Ramah*, 458 U.S. at 845; *Bracker*, 448 U.S. at 150. However, *Cotton Petroleum* abandoned the quid pro quo theory of taxation articulated in *Bracker* and *Ramah*. In *Cotton Petroleum*, the Court rejected the corporation's argument that "tax

payments by reservation lessees far exceed[ed] the value of services provided by the State to the lessees." 490 U.S. at 189. The Court noted that "the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it." *Id.*

* * *

Applying *Cotton Petroleum* to *Blaze* and *Arco*, we conclude that it was irrelevant that the state did not identify specific services or regulatory functions provided in exchange for taxes collected. Taxes are not imposed in exchange for services provided. Instead, taxes are a means of distributing the cost of government among the general population, including its Indian citizens. The state thus had an interest in taxing for the common good – i.e., the welfare of its entire populace, Indian and non-Indian alike. We hold that the interest in raising revenue was sufficient to justify levying the gross receipts tax on Blaze and Arco. We hold that the Court of Appeals erred by disregarding *Cotton Petroleum* and holding that state taxes must be directly linked to a state interest in the activity being taxed.

Id.

Contrary to the court's analysis in *Blaze Construction*, the Court in *Cotton Petroleum* did not equate the "quid pro quo theory" with the distinct contention that a state cannot tax on-reservation activities of non-Indians unless it provides regulatory or other services related to those activities. *Compare Cotton Petroleum* Part III, 490 U.S. at 176-87 *with Cotton Petroleum* Part IV, 490 U.S. 187-91.

More importantly and again contrary to the court's holding in *Blaze Construction*, the Court in *Cotton Petroleum* did not abandon the requirement of *White Mountain* and *Ramah* that there exist a relationship between the services the state provides and the on-reservation activities it seeks to tax. In *Cotton Petroleum*, the taxpayer argued that the state's oil and gas severance taxes interfered with applicable federal laws and policies, and that the state's responsibilities in connection with the taxpayer's on-reservation activities, in comparison to the responsibilities of the tribe, were "significantly limited." 490 U.S. at 177.

The Court found no implied intent to pre-empt state taxation of non-tribal member lessees in the applicable federal law. It further observed that, in *White Mountain*, it had held that the state had been "unable to identify any regulatory function or service (it) performed . . . that would justify the assessment of taxes for activities on [BIA] and tribal roads within the reservation." *Cotton Petroleum*, 490 U.S. at 184. The Court additionally noted that, in *Ramah*, it had concluded: "Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education – a scheme which has left the State with no duties or responsibilities." *Cotton Petroleum*, 490 U.S. at 185 (citations omitted).

The Court pointed out that, in contrast to those cases, the state provided the taxpayer and the tribe with substantial services, and "regulate[d] the spacing and mechanical integrity of wells located on the reservation." *Id.* at 185-86. It stated that the case before it was not one

"in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186. The Court held that, absent this "special factor" present in both *White Mountain* and *Ramah*, the "indirect," "insubstantial" economic effect that the state tax had on the tribe would not support a finding of pre-emption. *Id.* at 187. In contrast, here the services which the state provides to Blaze and to tribal members, substantial though they may be, have no direct connection either to Blaze's on-reservation road-construction and improvement activities or to the maintenance or use of those roads after Blaze's work on them is finished.

We thus agree with Blaze that the circumstances in this case are legally indistinguishable from those in *White Mountain*. The field of on-reservation activity that the state seeks to tax is governed by comprehensive federal regulations. Indeed, the road-building and improvement regulations that apply in the instant case are among those on which the Court in *White Mountain* in part based its finding of pre-emption. As it stated:

> . . . [T]his is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. . . . [W]e are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. . . . The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that

> respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme . . . .

448 U.S. at 150.

We distinguish our decision in *Pimalco v. Arizona Department of Revenue*, 233 Ariz.Adv.Rep. 28 (App. Jan. 9, 1997). In that case, we rejected the taxpayers' contention that imposition of the state's ad valorem property tax on their leasehold interests in tribal land was pre-empted by federal law. *Id.* at 32. Although the taxpayers relied on *White Mountain*, they failed to offer "the particularized examination of the relevant state, federal, and tribal interests" that the case requires. *Id.* Our opinion in *Pimalco* did not attempt to fill that void. Analogous decisions instead formed the basis for its holding that no conflict existed between the state tax and federal regulation of leaseholds in Indian trust land.

Additionally, in rejecting the taxpayers' related contention that application of the state tax interfered with tribal self-government, in *Pimalco* we referred to regulatory and other services not specific to the leasing of tribal trust land that the state provided to the taxpayers and the tribe. Unlike the situation in this case, the question whether such generalized state governmental services are material to Indian law pre-emption analysis was not raised in *Pimalco* and, therefore, the opinion in that case should not be read to address or resolve that question.

We conclude that the holding in *Hane Construction*, 115 Ariz. 243, has been superseded by governing federal

case law and is no longer authoritative. We also determine that the analysis in *Blaze Construction*, 884 P.2d 803, is unpersuasive. We hold (1) that the principles of Indian law pre-emption analysis apply in this case even though Blaze's contracts for on-reservation road improvements were let by the BIA rather than by the affected tribes and (2) that those principles require us to conclude that imposition of Arizona's contracting privilege tax on Blaze was impliedly pre-empted by federal law and therefore of no legal effect.

CONCLUSION

The judgment is reversed. This case is remanded to the tax court with directions to enter judgment for Blaze.

/s/ Susan A. Ehrlich
SUSAN A. EHRLICH, Judge

CONCURRING:

/s/ E. G. Noyes, Jr.
E. G. NOYES, Jr., Presiding Judge

/s/ Rudolph J. Gerber
RUDOLPH J. GERBER, Judge

APPENDIX B

SUPREME COURT
STATE OF ARIZONA
402 Arizona State Court Building
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Phoenix, Arizona 85007-3329

Telephone: (602) 542-9396

Noel K. Dessaint
Clerk of the Court

Kathleen E. Dempley
Chief Deputy Clerk

December 19, 1997

Re: STATE OF ARIZONA ex rel. ARIZONA DEPARTMENT OF REVENUE vs. BLAZE CONSTRUCTION COMPANY, INC.
Supreme Court No. CV-97-0257-PR
Court of Appeals No. 1 CA-TX 96-0010
Arizona Tax Court No. TX 94-00549

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 16, 1997, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Martone voted to grant the petition for review.

Record returned to the Court of Appeals, Division One, Phoenix this 19th day of December, 1997.

NOEL K. DESSAINT, Clerk

APPENDIX C

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

STATE OF ARIZONA, ex rel., ARIZONA DEPARTMENT OF REVENUE, Plaintiff, vs. BLAZE CONSTRUCTION COMPANY, INC., Defendant.	No. TX 94-00549 JUDGMENT (Hon. William J. Schafer III)

The above entitled and numbered cause having come before the Tax Court on cross-motions for summary judgment, and argument having been heard,

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the Department of Revenue's Motion for Summary Judgment is granted, Blaze Construction's motion for summary judgment is denied, and that judgment be entered for the Plaintiff against the Defendant.

Dated this 7 day of March, 1996.

William J. Schafer, III
Judge, Arizona Tax Court

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. WILLIAM J. SCHAFER, III

November 28, 1995 — J. Auchinleck, Deputy

No. TX 94-00549

STATE OF ARIZONA, ex rel., ARIZONA DEPARTMENT OF REVENUE, v. BLAZE CONSTRUCTION COMPANY, INC.,	Attorney General By: Patrick Irvine Gary Verburg #005515

On November 27, 1995, the Court heard argument on the cross motions for summary judgment. The Court feels that the decision in *Dept. of Revenue v. Hane Construction Co., Inc. 115 Ariz. 243, 564 P.2d 932* (Ct.App. 1977) is dispositive of the issue here. Therefore,

IT IS ORDERED granting the Department's motion for summary judgment and denying the taxpayer's cross-motion for summary judgment.

APPENDIX E

STATUTES INVOLVED

1. *The Arizona Transaction Privilege Tax, Title 42, Ch. 8, Art. 1, Arizona Revised Statutes (1991) provides in pertinent part:*

§ 42-1306. Levy of tax; purposes; distribution

A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the municipalities and counties in this state, to reduce or eliminate the annual tax levy on property for state, municipal and county purposes and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by this article.

B. If any funds remain after the payments are made for state purposes, as provided for by subsection A, the remainder of the funds shall be paid into the state school fund for educational purposes.

C. The tax levied by and collected pursuant to this article is designated the "transaction privilege tax".

§ 42-1310.16. Prime contracting classification; definitions; exemptions

A. The prime contracting classification is comprised of the business of prime contracting and dealership of manufactured buildings. The prime

contracting classification does not include the sale of a used manufactured building.

B. The tax base for the prime contracting classification is sixty-five per cent of the gross proceeds of sales or gross income derived from the business. The following amounts shall be deducted from the gross proceeds of sales or gross income before computing the tax base.

1. The sales price of land, which shall not exceed the fair market value.

2. Sales and installation of groundwater measuring devices required under § 45-604.

3. Furniture, furnishings, fixtures, appliances, and attachments not incorporated as component parts of manufactured buildings at the time of purchase by the dealership for resale. Such items are subject to the taxes imposed by this article separately and distinctly from the gross proceeds or gross income from the sale of the manufactured building.

C. Subcontractors or others who performed services in respect to any improvement, building, highway, road or railroad, excavation or other structure, project, development or improvement are not subject to tax if they can demonstrate that the job was within the control of a prime contractor or contractors or a dealership of manufactured buildings and that the prime contractor or dealership is liable for the tax on the gross income, gross proceeds of sales or gross receipts attributable to the job and from which the subcontractors or others were paid.

D. For purposes of this section:

1. "Contracting" means engaging in business as a contractor.

2. "Contractor" is synonymous with the term "builder" and means a person, firm, partnership, corporation, association or other organization, or a combination of any of them, that undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structure or works in connection therewith, and includes subcontractors and specialty contractors. For all purposes of taxation or deduction, this definition shall govern without regard to whether or not such contractor is acting in fulfillment of a contract.

3. "Dealership of manufactured buildings" means a dealer who is licensed pursuant to title 41, chapter 16, who sells at retail manufactured homes, mobile homes or factory-built buildings, as such terms are defined in § 41-2142, and who supervises, performs or coordinates the excavation and completion of site improvements, setup or moving of a manufactured home or factory-built building including the contracting, if any, with any subcontractor or special contractor for the completion of the contract.

4. "Prime contracting" means engaging in business as a prime contractor.

5. "Prime contractor" means a contractor who supervises, performs or coordinates the construction, alteration, repair, addition, subtraction,

improvement, movement, wreckage or demolition of any building, highway, road, railroad, excavation or other structure, project, development or improvement including the contracting, if any, with any subcontractors or specialty contractors and is responsible for the completion of the contract.

E. Every person engaging or continuing in this state in the business of prime contracting or dealership of manufactured buildings shall present to the purchaser of such prime contracting or manufactured building a written receipt of the gross income or gross proceeds of sales from such activity and shall separately state the taxes to be paid pursuant to this section.

2. *The Buy Indian Act, 25 U.S.C. § 47, as amended through 1994, provides:*

§ 47. Employment of Indian labor and purchase of products of Indian Industry

So far as may be practicable Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior. Participation in the Mentor-Protege Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2301 note) or receipt of assistance pursuant to any developmental assistance agreement authorized under such program shall not render Indian labor or Indian industry ineligible to receive any assistance authorized under this section. For the purposes of this section -

(1) no determination of affiliation or control (either direct or indirect) may be found between a

protege firm and its mentor firm on the basis that the mentor firm has agreed to furnish (or has furnished) to its protégé firm pursuant to a mentor-protege agreement any form of developmental assistance described in subsection (f) of section 831 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2301 note):

(2) the terms 'protege firm' and 'mentor firm' have the meaning given such terms in subsection (c) of such section 831.

3. *Section 124(b) of the Surface Transportation Act of 1982, P.L. 97-424. approved January 6, 1983, 96 Stat. 2097, 2114, 23 U.S.C. § 204 provides:*

§ 204 Federal Lands Highways Program [lands highways program]

(a) Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-Aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title.

(b) Funds available for forest highways and public lands highways shall be used by the Secretary to pay for the cost of construction and improvement thereof. Funds available for park roads, parkways and Indian reservation roads shall be used by the Secretary of the Interior to pay for the cost of construction and improvement thereof. In connection therewith, the Secretary and the Secretary of the Interior, as appropriate, may enter into construction contracts and such other contracts with a State or civil subdivision thereof or Indian tribe as deemed advisable. In the case of Indian reservation

roads, Indian labor may be employed in such construction and improvement under such rules and regulations as may be prescribed by the Secretary of the Interior. No ceiling on Federal employment shall be applicable to construction or improvement of Indian reservation roads.

(c) Before approving as a project on an Indian reservation road any project on a Federal-aid system in a State, the Secretary must determine that the obligation of funds for such project is supplementary to and not in lieu of the obligation, for projects on Indian reservation roads, of a fair and equitable share of funds apportioned to such State under section 104 of this title.

(d) Cooperation of States, counties, or other local subdivisions may be accepted in construction and improvement, and any funds received from a State, county, or local subdivision shall be credited to appropriations available for the class of Federal lands highways to which such funds were contributed.

(e) Construction of each project shall be performed by contract awarded by competitive bidding, unless the Secretary or the Secretary of the Interior shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. Notwithstanding the foregoing, the provisions of section 23 of the "Buy Indian" Act of June 25, 1910 (36 Stat. 891), and the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2205) shall apply to all funds administered by the Secretary of the Interior which are appropriated for the construction and improvement of Indian reservation roads.

(f) All appropriations for the construction and improvement of each class of Federal lands highways shall be administered in conformity with regulations and agreements jointly approved by the Secretary and the Secretary of the appropriate Federal land managing agency.

APPENDIX F

REGULATIONS INVOLVED

1. *Part 170 - Roads of the Bureau of Indian Affairs - of Title 25 of the Code of Federal Regulations (1996), provides in pertinent part:*

§ 170.3 Construction and improvement.

Subject to the availability of appropriations for Indian reservation roads and bridges and any other contribution of State or Indian tribal lands, the Commissioner shall plan, survey, design and construct roads on the Federal-Aid Indian Road System to provide an adequate system of road facilities serving Indian lands.

§ 170.4 Approval of road construction activities.

The Secretary of Transportation or his authorized representative shall approve the location, type, and design of all projects on the Federal-Aid Indian Road System before any construction expenditures are made. All such construction shall be under the general supervision of the Secretary of Transportation or his authorized representative.

(23 U.S.C. 208)

§ 170.4a Selection of road construction projects.

The Commissioner, who is responsible for the planning, surveys and design, shall keep the appropriate local tribal officials informed of all technical information relating to the project alternatives of proposed road developments. The Commissioner shall recommend to the tribe those proposed road projects having the greatest need as determined by the comprehensive transportation analysis. Tribes shall then establish annual priorities for road construction projects. Subject to the approval of the Commissioner,

the annual selection of road projects for construction shall be performed by tribes. Funds available for the construction of roads on the Federal-Aid Indian Road System shall not be used for the capital improvement to privately-owned property. (39 Stat. 355)

§ 170.5 Right-of-way.

(a) The procedure for obtaining permission to survey and for granting any necessary right-of-way are governed by part 169 of this chapter. Tribal consent as required under § 169.3(a) may be made by public dedication where proper tribal authority exists. Before any work is undertaken for the construction of road projects, the Commissioner shall obtain the written consent of the Indian landowners. Where an Indian has an interest in tribal land by virtue of a land use assignment, such consent shall be obtained from both the landholder of the assignment and the Indian tribe. Right-of-way easements are to be on a form approved by the Commissioner.

(b) If it appears that the road might be transferred to the tribe, the county or the State within 10 years, then before such construction is undertaken, right-of-way easements for the project shall be obtained in favor of the United States, its successors and assigns, with the right to construct, maintain and repair improvements thereon and thereover, for such purposes and with the further right in the United States, its successors and assigns, to transfer the right-of-way easements by assignment, grant or otherwise.

§ 170.5a Employment of Indians.

The Bureau of Indian Affairs road program shall be administered in such a way as to provide training and employment of Indians. The Commissioner may contract with tribes and Indian-owned construction companies, or the Commissioner may purchase materials,

obtain equipment and employ Indian labor in the construction and maintenance of roads.

(36 Stat. 861; 78 Stat. 241, 253; 78 Stat. 257; 25 U.S.C. 47; 42 U.S.C. 2000e(b), 2000e-2(i); 23 U.S.C. 208(c))

§ 170.6 Maintenance of Indian roads.

The administration and maintenance of Indian reservation roads and bridges is basically a function of the local Government. Subject to the availability of funds, the Commissioner shall maintain, or cause to be maintained, those approved roads on the Federal-Aid Indian Road System. The Commissioner may also maintain roads not on the Federal-Aid Indian Road System if such roads meet the definition of "Indian reservation road and bridges" and are approved for maintenance by the Commissioner. No funds authorized under 23 U.S.C. 208 are available for the maintenance of roads.

§ 170.6a Contributions from tribes.

The Commissioner may enter into agreements with an Indian tribe for a contribution from its tribal funds for the construction or maintenance of roads governed by regulations of this part. However, the tribe must be able to make such contributions without undue impairment of the necessary tribal functions.

2. *Part 271-Contracts Under the Indian Self-Determination Act of Title 2 of the Code of Federal Regulations (1996)(superceded by 25 C.F.R. Part 900, effective June 24, 1996, 61 FR 32501), provides in pertinent part:*

§ 271.4 Statement of policy.

(a) The Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of

educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planing, conduct, and administration of those programs and services

(c) It is the policy of the Bureau to facilitate the efforts of Indian tribes to plan, conduct, and administer programs, or portions thereof, which the Bureau is authorized to administer for the benefit of Indians and to facilitate the coordination of all Federal and other programs on Indian reservations.

(d) It is the policy of the Bureau to continually encourage Indian tribes to become increasingly knowledgeable about Bureau programs and the opportunities Indian tribes have regarding them; however, it is the policy of the Bureau to leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts.

(e) It is the policy of the Bureau not to impose sanctions on Indian tribes with regard to contracting or not contracting; however, the special resources made available to facilitate the efforts of those Indian tribes which do wish to contract should be made known to all tribes, as should the current realities of funding and Federal personnel limitations.

(f) Contracting is one of several mechanisms by which Indian tribes can exercise their right to plan, conduct, and administer programs or portions thereof which the Secretary is authorized to administer for the benefit of Indians. Another mechanism afforded Indian tribes is the use of a grant, as provided in part 272 of this chapter, or other resources, to plan the manner in which it wishes the Bureau to operate a program or portion thereof.

(g) Contracting by its very nature places Bureau officials in the dual position of assisting Indian tribes, in many instances, by furnishing technical assistance in preparation of contract proposals, and of carrying out their fiscal and administrative responsibilities as officials of the Federal Government. It is recognized that very often these two positions are in opposition to each other. The Act and these regulations are designed to address this problem to the degree practicable. The Commissioner, Area Directors and Superintendents, as line officers of the Bureau, are expected to balance these two positions within the framework of the regulations in this part.

(h) The regulations in this part are not meant to and do not change the eligibility criteria which individuals must meet to be eligible for any program currently operated by the Bureau. The eligibility criteria for each Bureau program is given in the part of 25 CFR chapter I, which deals with that program. A contractor shall use the existing Bureau eligibility criteria in operating all or parts of a Bureau program under a contract under this part unless a waiver is obtained from the Commissioner. The Commissioner may not waive eligibility criteria established by statute. The Commissioner may waive eligibility criteria established by regulation in 25 CFR chapter I.

§ 271.11 Eligible applicants.

Any tribal organization is eligible to apply for a contract or contracts with the Bureau to plan, conduct, and administer all or parts of Bureau programs under section 102 of the Act. However, before the Bureau can enter into a contract with a tribal organization, it must be requested to do so by the Indian tribe or tribes to be served by the contract in accordance with § 271.18.

§ 271.12 Contractible Bureau programs.

(a) Tribal organizations are entitled to contract with the Bureau to plan, conduct, and administer all or parts of any program which the Bureau is authorized to administer for the benefit of Indians. All or parts of any program include:

(1) Any part of a Bureau program which is divisible from the remainder of the program so long as the contract does not significantly reduce benefits to Indians served by the non-contracted part(s) of the program. However, to the extent that it is within the Bureau's existing authority and the program or part thereof involves only one tribe and one Bureau Agency or Area Office, the benefits provided to Indians by the non-contracted part(s) of the program may be reduced at the request of the tribe. When the program or part thereof serves more than one tribe, the benefits provided by the noncontracted part(s) of the program may be reduced when all of the tribes served consent to a reduction.

(2)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

vs.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the Arizona Court of Appeals, Division One

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the imposition of a state transaction privilege (sales) tax on road construction activity located entirely on Indian reservations pre-empted by federal law when the road construction is financed and regulated by the Bureau of Indian Affairs, and the State provides no services or regulatory activities in connection with the activities being taxed?

STATEMENT PURSUANT TO RULE 29.6

Respondent Blaze Construction Company, Inc. certifies that it does not have a parent company and does not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

In 1980, this Court said that all courts must examine the federal, tribal and state interests at stake to determine if the assertion of State authority violates federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 184 (1989); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982). The Arizona Court of Appeals correctly applied the analysis mandated by this Court and ruled that petitioner's taxation of respondent's road construction projects on Indian reservations was pre-empted by federal law.

The Court should reject petitioner's request for a writ of certiorari. Petitioner's position is based on a mischaracterization of the ruling of the Court in *Cotton Petroleum*. Instead of relying on the decisions of the Court, petitioner relies on a decision by a state court that misinterpreted the law, and a Ninth Circuit decision that is logically flawed.

Petitioner ignores the federal and tribal interests at stake and advances the position that states are free to tax activity on Indian reservations even if a state does not regulate or have any interest in that activity. The record does not contain any evidence that petitioner has any regulatory interest or provides any services related to respondent's construction activities. Appendix to Petition for Certiorari (hereinafter "App.") 18. The court of appeals noted an important consideration for determining the strength of petitioner's interest: A state's interest is the strongest when there is a regulatory interest that justifies the tax. App. 18-24. Thus, the lower court properly applied the pre-emption analysis of this Court.

The Arizona Court of Appeals disagrees with a decision by the New Mexico Supreme Court. The Arizona Court of Appeals,

however, correctly pointed out the errors made by the New Mexico court. The decision by the Arizona court fosters certainty in this area of law because it reiterates the doctrinal foundations that this Court established in *White Mountain*, *Ramah*, and *Cotton Petroleum*.

A. Factual Background

Respondent is a 100% Indian-owned company that is incorporated under the laws of the Blackfeet Tribe.[1] Respondent works on construction projects exclusively on Indian reservations. Respondent entered into nineteen contracts with the Bureau of Indian Affairs (BIA) to build rural roads on the Navajo, Hopi, Fort Apache, Colorado River, Papago (Tohono O'odham) and San Carlos Apache Indian reservations. The roads are located in extremely remote regions and primarily serve local Native American settlements. The record shows that many of these roads were intended to provide access to residential areas.

Petitioner did not provide any services to respondent for these construction projects. Petitioner played no role in the planning or development of the projects, and it did not issue any permits to respondent. Petitioner did not issue any licenses or certificates to respondent. Petitioner did not provide any employment, or quality or safety inspection services for these projects. Finally, petitioner did not appropriate any funds for general road construction during the term of the tax assessment. In fact, one witness in this case testified that he was not aware

1. Respondent concedes that for purposes of pre-emption analysis it stands in the same position as a non-Indian. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 160-61 (1980). The fact that respondent is a Blackfeet corporation is, however, relevant to compliance with the provisions of the Buy Indian Act, 25 U.S.C. § 47.

of petitioner providing any maintenance of tribal roads within the past twenty-five years.[2]

The federal government regulated the construction of the roads set forth in the nineteen contracts. The tribes work closely with the BIA to set construction priorities for the BIA. The BIA relies on these tribal priorities when it selects the roads for construction contracts.

The BIA has a limited amount of funds available for road construction and improvement projects. The BIA specifications require contractors that bid on road projects to include all federal, state and local taxes in a bid. Thus, if a state imposes a 5% tax on a contractor, that translates into 5% fewer roads being built under the contract. *See generally* Reply Brief at 3 (quoting Transcript of Hearing before Arizona Dept. of Revenue).

After opening the bidding process on a road construction project, the BIA cannot give preferential treatment to reservation-based Indians. The Buy Indian Act requires that the bidding be opened to all Indian-owned companies on an equal basis. The Indian Self-Determination Act gives either a tribe or the BIA

2. The petition for certiorari contains a factual error. Petitioner cites as a "fact" that it spends $100,000,000 on schools. Petition at 4. Petitioner did not present this alleged "fact" to the superior court as a statement of fact for the cross-motions for summary judgment. When petitioner made this assertion at the appellate level, respondent objected to it. *See* Reply Brief at 1. The assertion set forth in the petition could not be considered by an Arizona appellate court as a matter of law. *See West v. Baker*, 510 P.2d 731, 734-35 (Ariz. 1973) (refusing to consider document attached to appellate brief); *Nelson v. Nelson*, 791 P.2d 661, 664 (Ariz. Ct. App. 1990) (refusing to consider affidavit filed after entry of summary judgment). Since this factual statement could not be considered by the Arizona Court of Appeals, this Court should not consider it to be part of the factual record in this matter.

the authority to enter into road construction projects such as the ones at issue in this case. The BIA provides oversight for the road projects as part of its trust responsibilities to Indian tribes.

B. Proceedings Below

The Arizona Board of Tax Appeals issued a unanimous decision on July 18, 1994 and held that the "competing federal, state and tribal interest at stake in this case compel preemption of Arizona's transaction privilege tax." Petitioner appealed this decision by filing a complaint in Maricopa County Superior Court. The trial court ruled on cross-motions for summary judgment in November, 1995. The superior court judge held that *Department of Revenue v. Hane Construction Co.*, 564 P.2d 932 (Ariz. Ct. App. 1977), was dispositive and overruled the decision by the Board of Tax Appeals.

Respondent appealed the judgment to the Arizona Court of Appeals. The appellate court overruled *Hane Construction* because its was not premised on the implied pre-emption analysis mandated by this Court. App. 11, 25-26. The court of appeals concluded that the various federal statutes governing respondent's construction projects constituted a comprehensive federal regulatory scheme. App. 15-16, 24. The court also held that petitioner failed to establish any regulatory interest in the road construction projects and cited the reasoning of this Court in *White Mountain Apache Tribe* and *Ramah. See generally* App. 17-18. The court of appeals also noted that in *Cotton Petroleum* this Court distinguished its conclusions in *White Mountain Apache Tribe* and *Ramah* because the record before it showed state regulation of oil wells. *Id.*

REASONS FOR DENYING THE WRIT

The United States Supreme Court has never abandoned the implied pre-emption analysis set forth in cases such as *White Mountain Apache Tribe* and *Ramah*. In *Cotton Petroleum*, the Court applied the same analysis, but upheld the imposition of a state tax because the state regulated oil wells. Petitioner is trying to create confusion in this area of law by misinterpreting this Court's rejection of a commerce clause argument made by the corporation in *Cotton Petroleum*. The decision by the court of appeals correctly pointed out the unwavering approach followed by this Court. The court of appeals rejected the analysis of the New Mexico Supreme Court and identified problems with the language employed in some decisions of the Ninth Circuit Court of Appeals because those decisions did not follow *White Mountain Apache Tribe*, *Ramah* and *Cotton Petroleum*.

I.

THE CONFLICT BETWEEN THE ARIZONA COURT OF APPEALS AND THE NEW MEXICO SUPREME COURT IS NOT A REASON TO GRANT CERTIORARI BECAUSE THE COURT BELOW CORRECTLY DECIDED THIS CASE.

Petitioner contends that the Court should grant a writ because the decision below purportedly conflicts with opinions from the Ninth Circuit and conflicts with a decision by the New Mexico Supreme Court. The court of appeals decision is consistent with Ninth Circuit law. In *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994), and *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 660 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990), the circuit court pointed out that when analyzing the strength of the state's interest, state regulation of the on-reservation activity is critical. The Ninth

Circuit invalidated the California tax on timber cutting in *Hoopa Valley* because California "plays no role in the Hoopa Valley Tribe's timber activities." 881 F.2d at 66

In *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), the Ninth Circuit used this Court's pre-emption analysis. The record in *Gila River* showed State involvement in the on-reservation activities at issue. The Gila River tribe developed Compton Terrace (a concert venue) and Firebird International Raceway for various events. The State provided law enforcement services for concerts and races at state expense. The Arizona Highway Patrol and the Department of Transportation provided traffic control services for the various events. The State exercised concurrent jurisdiction over liquor sales, and provided a legal forum for civil and criminal cases. 91 F.3d at 1238-39. The Ninth Circuit held that these on-reservation activities constituted an interest that "justifies taxing the beneficiaries of those services." *Id.* at 1239. Thus, the court held that a state tax on the sale of tickets and concession items was not pre-empted by federal law.[3]

The analysis employed by the Arizona Court of Appeals here is consistent with the implied pre-emption analysis employed by the Ninth Circuit in *Waddell, Cabezon* and *Hoopa Valley*. The Arizona Court of Appeals evaluated whether there

3. Judge O'Scannlain wrote the opinions in both *Waddell* and *Cabazon*. In *Cabazon*, Judge O'Scannlain noted the importance of a regulatory interest in on-reservation activities to determine the strength of a state's interest. When Judge O'Scannlain later wrote the *Waddell* decision, he did not overrule his prior decision or reject his analytical framework. Reading the *Cabezon* and *Waddell* decisions together, this Court should conclude that in the Ninth Circuit a regulatory interest is still an important factor when evaluating the strength of the state's interest. This conclusion is consistent with the opinion of the Arizona Court of Appeals in this case.

was a comprehensive regulatory scheme, App. 15-16, decided if the tax adversely affected the interests of the Tribe, App. 16, and determined the strength of petitioner's interest. App. 16-24. The length of the court of appeals' decision was due to the need to respond to the erroneous argument of petitioner and not because the court allegedly gave undue weight to any particular factor. *See generally* App. 16-24.

Respondent concedes that the decision below conflicts with the decision of the New Mexico Supreme Court in *Blaze Construction v. Taxation and Revenue Dept.*, 884 P.2d 803 (N.M. 1994). The conflict between the Arizona and New Mexico courts, however, is not a reason to accept the petition here because the Arizona Court of Appeals correctly decided the case.[4]

II.

THE COURT OF APPEALS APPLIED THE PROPER ANALYSIS AND REACHED THE CORRECT RESULT IN THIS CASE.

The Arizona Court of Appeals properly decided two legal issues germane to the petition. First, the court concluded that the privilege tax that petitioner wants to impose on respondent

4. In *Ramah*, this Court said,

> Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

458 U.S. at 846. Unfortunately, the New Mexico courts have not heeded the scolding by this Court and still do not follow the letter and spirit of Indian pre-emption law.

is subject to pre-emption analysis. Second, the lower court said that whether a state regulates on-reservation activity is a relevant factor when weighing the state's interest in the three-part pre-emption test.

A. Implied Pre-emption Analysis Applies in this Case

For the past eighteen years, petitioner has been presenting the same arguments to the courts in this country regarding whether implied pre-emption analysis applies to its taxes. Petitioner contends that the Arizona Court of Appeals erred because the contract was between respondent and the Bureau of Indian Affairs regarding road construction on reservations. Petition at 15. The Court should deny petitioner's writ because it is based on an argument the Court has already rejected.

In *White Mountain Apache Tribe*, the Court rejected the idea that there was a difference between imposition of the taxes for commercial activity on roads maintained by the tribe and those maintained by the Bureau of Indian Affairs. 448 U.S. at 149 n.14. The Court said,

> For purposes of federal preemption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

Id.

The Court continued to follow this approach in *Cotton Petroleum* when it noted that the roads in *White Mountain* were " 'built, maintained and policed exclusively by the Federal Government, the Tribe, and its contractors.' " *Cotton Petroleum*, 490 U.S. at 184 (quoting *White Mountain Apache Tribe*, 448

U.S. at 150). This Court has never created an exception to its pre-emption analysis depending on whether a contractor is contracting with an Indian tribe or the BIA. No such distinction is appropriate because the BIA enters into contracts pursuant to its trust obligations, App. 8, and after input from tribal road committees on the work that should be done. Reply Brief at 4 (quoting Transcript of Hearing before Arizona Dept. of Revenue).

Petitioner asks this Court to adopt a mechanical approach to the pre-emption issue. Petitioner believes that if there is any contract between the BIA and a non-Indian, pre-emption analysis does not apply. This may be the rule for cases that involve activity off of a reservation, *United States v. New Mexico*, 455 U.S. 720 (1982), but it does not hold true for on-reservation contracts. When a state asserts authority over contractors on tribal lands, the courts do not apply a "mechanical or absolute" concept of sovereignty. *White Mountain Apache Tribe*, 448 U.S. at 145. State assertions of authority for on-reservation activities are pre-empted if they interfere with federal law or tribal interests. Thus, the Arizona Court of Appeals properly concluded that it should employ the implied pre-emption test. App. 5-9.

B. The Decision Below Correctly Analyzed the Federal and Tribal Interests

The only "bright-line" rule that applies to pre-emption issues is when a state attempts to tax a tribe or tribal members, the tax is invalid. *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S. Ct. 2214, 2220 (1995). If, however, a state imposes a tax on non-tribal members for activity that occurs on an Indian reservation, there is no mechanical rule. A court must balance the federal, state and tribal interests. *See Ramah*, 458 U.S. at 837 ("no definitive formula for resolving the issue of whether States may exercise authority "over tribal members or reservation

activities"); *White Mountain Apache Tribe*, 448 U.S. at 145 (no "mechanical or absolute conceptions of state or tribal sovereignty").

Moreover, the Court has already rejected petitioner's argument that a state is free to tax non-Indians engaging in commerce on a reservation. Petition at 10. In *White Mountain Apache Tribe*, the Court said that a state cannot "assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary." 448 U.S. at 150-51; *see also Ramah*, 458 U.S. at 843. Thus, the court of appeals' decision is correct on this point of law.

The first interest that the Arizona Court of Appeals analyzed in its decision was the federal interest in road construction on reservations. App. 15-16. The Secretary of the Interior adopted "detailed regulations governing the roads developed by the [BIA]." *White Mountain Apache Tribe*, 448 U.S. at 147-48; App. 15. The federal government provides the funding for the administration and maintenance of the roads. *White Mountain Apache Tribe*, 448 U.S. at 148. The BIA adopted regulations governing all aspects of contracting, 48 C.F.R. Part 1; construction and improvement, 25 C.F.R. § 170.3; approval of location and design, 25 C.F.R. § 170.4; selection of projects, 25 C.F.R. § 170.4(a); maintenance of roadways, 25 C.F.R. § 170.6; use of roads, 25 C.F.R. § 170.8; and policing of roads, 25 C.F.R. Part 11. During construction, the BIA provides day-to-day supervision of all aspects of the construction project. The court of appeals followed this Court and held that the regulations pertaining to the construction of roads on Indian reservations constitute a pervasive regulatory scheme. App. 15-16.

The taxes petitioner seeks to impose also affect the interests of the various Indian tribes and interfere with the BIA

regulations. The Self-Determination Act regulations provide that the BIA is to "leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts." 25 C.F.R. § 271.4(d). The Secretary adopted this regulation so that tribes are not put in any better or worse position if they decide to enter into their own contracts or choose to allow the BIA to contract on their behalf for construction of roads.

Petitioner's privilege tax directly infringes on tribal sovereignty. The construction of roads is an integral part of the role of a federal, state or tribal government to provide for the health, safety and welfare of its citizens. Here, a tribal committee set priorities for road construction projects. *See generally* Reply Brief at 4 (quoting Transcript of Hearing before Arizona Dept. of Revenue). The BIA then implements the projects. If a tribe enters into a contract itself, petitioner concedes that it cannot impose the privilege tax on the contractor. If, however, the tribe makes the governmental decision to allow the BIA to enter into contracts on its behalf, petitioner contends that it can tax the contractor for the same work.

Under petitioner's pre-emption theory, however, tribes that utilize the BIA for road construction projects are penalized because they get fewer miles of roads than tribes who obtain the same money from a grant and contract with a company like respondent. The tax petitioner seeks to impose has to be included in a bid submitted to the BIA. Reply Brief at 3 (quoting Transcript of Hearing before Arizona Dept. of Revenue). The BIA pays the tax from the money appropriated for road construction. Consequently, the 5% tax means that the BIA builds 5% fewer miles of road. *Id.* Petitioner's privilege tax impedes the federal and tribal interests in constructing the most roads for the members of Indian tribes. *See Ramah*, 458 U.S.

at 842 (tax on the contractor "impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the funds available for the construction of Indian schools"). In other words, an Indian tribe cannot act independently if it wants to build the most roads for its members. Petitioner's tax is contrary to the comprehensive federal scheme favoring Indian self-determination.

C. The Arizona Court of Appeals Properly Analyzed the Strength of Petitioner's Interest

Petitioner's interests are in stark contrast to the comprehensive federal regulations of roads on Indian reservations and the tribal interests. If petitioner's only interest is simply to raise revenue, that interest does not outweigh the significant federal interests and is, therefore, pre-empted by federal law. *Ramah*, 458 U.S. at 839, 845 (when the only incident is the "general desire to raise revenue," the State's interest is "insufficient to justify the State's intrusion into a sphere so heavily regulated by the Federal Government"); *White Mountain Apache Tribe*, 448 U.S. at 148-50 (Arizona "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation"). This Court has never deviated from this principle.

The Arizona Court of Appeals pointed out that petitioner did not make any claim that it was regulating or providing any services related to the road construction projects at issue. App. 18. The court of appeals rejected the argument that general state services were sufficient to justify this specific tax. *Id.* at 18-19. Petitioner argues that the Court should accept the writ because the Arizona Court of Appeals wrongly concluded that there had to be some connection between a tax and on-reservation

conduct. Petitioner further contends that it "does not have to justify a tax with a showing of specific state services. . . ." Petition at 13. This Court should reject the writ because the argument by petitioner is wrong.

In *Ramah*, the Court found the New Mexico's tax pre-empted New Mexico's tax on a construction project and said, "[T]he State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying for this tax." 458 U.S. at 843. The State also did not assert any regulatory interest to justify the imposition of its gross receipts tax. *Id.* at 844; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983) ("The State has failed to 'identify any regulatory function or service that would justify' the assertion of concurrent regulatory authority."). The Court prohibited New Mexico from imposing any additional burden on the comprehensive, educational regulatory scheme intended to provide education to Indian children. *Ramah*, 458 U.S. at 843.

The Court also rejected the argument by New Mexico that general services provided by the State to the Ramah Navajo Indians justified the imposition of the gross receipts tax. 458 U.S. at 845 n.10. The Court rejected this argument because there was no evidence that "these benefits *are in any way related to the construction of schools* on Indian land." *Id.* (emphasis added).

The Court's decision in *Cotton Petroleum* followed this same analysis, but concluded that the tax was not pre-empted by federal law because the facts were different from those in *Ramah* and *White Mountain Apache Tribe*. The Court noted that in *White Mountain Apache Tribe* and *Ramah*, "both cases involved complete abdication or noninvolvement of the State in the on-reservation activity." 490 U.S. at 185. In *White*

Mountain Apache Tribe, there was no regulatory function or service that justified the imposition of the tax. 490 U.S. at 184. The Court pointed out that in *Ramah*, there was "no legitimate regulatory interests that might justify the tax." 490 U.S. at 184. This Court did not reject the reasoning of *Ramah* and *White Mountain Apache Tribe* in *Cotton Petroleum.*

Instead, the Court applied the same analysis, but upheld the tax because New Mexico regulated the corporation's oil wells. New Mexico regulated the spacing and mechanical integrity of the wells on the reservation. 490 U.S. at 185-86. The federal regulations of the mineral extraction activities were not exclusive. *Id.* at 186. Moreover, New Mexico provided to Cotton Petroleum $89,384 in services for its on-reservation business. Rather than a complete abdication of oil and gas activities, New Mexico was involved in the regulation of Cotton Petroleum's business activities and not just the collection of tax revenues. *Id.* at 185-86. The Court said,

> We thus conclude that federal law, even when given the most generous construction, does not preempt New Mexico's oil and gas severance taxes. This is not a case ***in which the State has had nothing to do with the on-reservation activity, save tax it.***

490 U.S. at 186 (emphasis added).

Petitioner and the New Mexico Supreme Court misinterpreted this Court's remarks in *Cotton Petroleum* regarding a proportional tax. In *Cotton Petroleum*, the company objected to the regulatory activity and argued that the taxes were excessive given the governmental benefits bestowed on it. 490 U.S. at 185. Cotton Petroleum tried to interject into federal pre-emption law the requirement that a state tax be proportional to the state regulatory activity or the benefits

provided by the State to the taxpayer. Cotton Petroleum made a bad argument and this Court rejected it.

The Court said that taxes do not have to be proportional to a regulation or the State's interest in the on-reservation activity. The Court did not abandon the importance of a regulatory function or State interest in the on-reservation activity. 490 U.S. at 186 ("this is not a case in which the State has nothing to do with the on-reservation activity"). The Court merely said that if there is a regulation or a State interest, the amount of money the State spends on regulatory activity or assistance does not have to be equal to or in proportion to the amount of taxes. 490 U.S. at 185.

The Court rejected Cotton Petroleum's argument just as it had in previous cases in which taxpayers claimed that their tax burden was outweighed by the governmental benefits that they received. *See generally Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937) (rejecting due process challenge to tax); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981) (rejecting due process challenge to taxes). This Court cited *Carmichael* for the proposition that a valid tax did not have to be proportional to a benefit. Indian pre-emption law, however, addresses the more fundamental issue of whether a state can impose any tax. A state can only impose a valid tax if the federal and tribal interests do not outweigh the interests of a state. If a state is permitted by federal law to impose a tax, then it is irrelevant whether the tax is proportional to the benefits provided by the State. *See Salt River Pima-Maricopa Indian Comm. v. State*, 50 F.3d 734, 737-38 (9th Cir. 1995) (finding that state's interest outweighed federal interests and then rejecting contention that tribe entitled to receive proportional share of tax receipts), *cert. denied*, 116 S. Ct. 198 (1995); App. 19 (*Salt River* rejected the view that to collect the taxes the value of the services was proportional to the taxes).

This Court has never strayed from its decisions in *White Mountain* and *Ramah* in which state taxation of non-Indians working on tribal lands were invalid because there was a tax, but no state regulation of the on-reservation activity. The one bright-line rule that comes out of *White Mountain*, *Ramah* and *Cotton Petroleum* is that when there is no state regulation or involvement in the on-reservation activity, then the tax is invalid. Thus, the decision by the Arizona Court of Appeals was correct. The decisions by the New Mexico Supreme Court in *Blaze Construction* and the Ninth Circuit in *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996), are simply wrong.[5] The Supreme Court should reject the writ because the Arizona Court of Appeals correctly decided the case.

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5. In *Waddell*, the Ninth Circuit applied the correct pre-emption analysis, 91 F.3d at 1238-39, but went on to say that there does not have to be a "direct connection" between state tax revenues and the services provided to a tribe. *Id.* at 1239. The Ninth Circuit's language was unnecessary because the court found that the state's interest outweighed the federal interests. While there may not need to be a "direct connection" between the tax and the regulation, (e.g., the tax revenue funds just the state regulatory agency), this Court has never said that a state is free to tax on-reservation activity if there is no regulation of the on-reservation activity. To the extent that the Ninth Circuit's decision in *Waddell* disagrees with this proposition, it is wrong.

CONCLUSION

Petitioner is trying to tax an essential tribal and federal governmental function — the construction of roads. Petitioner is trying to "push the envelope" regarding its taxing authority over activity on Indian reservations. The record shows that petitioner provides no services, regulatory function or financial assistance to the road construction activity being taxed, yet petitioner is attempting to tax the activity. Given petitioner's total abdication of responsibility and its disparate treatment of Indian communities in the area of funding for local road construction, what legitimate interest is being served by the tax at issue? The answer is none.

The construction of community roads is an essential, local governmental function, and is a function performed by the various Indian tribes and the Bureau of Indian Affairs. Petitioner's tax on this activity certainly burdens the tribal and federal interests at stake. Under well-established case law from this Court, state taxes of on-reservation construction activities are pre-empted by principles of Federal Indian law when a state has no interest in the activity being taxed.

For the foregoing reasons, Respondent Blaze Construction Company requests that the United States Supreme Court deny the petition for writ of certiorari.

Respectfully submitted,

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No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

JOINT APPENDIX

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Certiorari Granted May 18, 1998

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59 pp

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[1] Included in court's docket, but not listed or numbered on Index sent to court of appeals. Copy attached to Appellant's Opening Brief at the Arizona Court of Appeals.

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5	7/03/97	Appendix to Response to Petition for Review [Appellant Blaze Construction Co Inc]
8	12/16/97	ORDERED: Petition for Review = DENIED.
8A	12/16/97	Justice Martone voted to grant the petition for review.

BEFORE THE STATE BOARD OF TAX APPEALS,
DIVISION TWO
STATE OF ARIZONA
1501 West Washington Street, Room 224
Phoenix, Arizona 85007
(602) 542-3288

BLAZE CONSTRUCTION COMPANY, INC., Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	)	Docket No. 950-92-S NOTICE OF DECISION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State Board of Tax Appeals, Division Two, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Blaze Construction Company, Inc. ("Appellant") is an Indian-owned company located in Oregon and incorporated under the laws of the Blackfeet Tribe. Its sole owner is William Aubrey, a member of the Blackfeet Tribe. Appellant works exclusively on construction projects on Indian reservations located within several states, including Arizona.

The Arizona Department of Revenue ("Department") assessed transaction privilege tax on Appellant's gross receipts received between June 1, 1986 and August 31,

1990, pursuant to a number of contracts. Each of the contracts in issue was entered into between Appellant and the Bureau of Indian Affairs ("BIA").

Under the contracts in issue, Appellant either built Indian housing and residential streets around same, or built or rehabilitated roads improving access to local tribal government buildings, housing, farms, ranches and schools. Appellant does not own or maintain any offices, construction yards, or other facilities in Arizona other than those on Indian reservations. Appellant is not required by the BIA or any other reservation contracting agency to be licensed by Arizona and, in fact, Appellant is not licensed by the State.

After unsuccessfully appealing to the Department, Appellant now timely appeals to this Board.

DISCUSSION

The issue on appeal is whether a 100% Indian-owned contractor is liable for Arizona transaction privilege tax on its gross receipts for construction performed exclusively on Indian reservations pursuant to contracts with the BIA.

Appellant argues that it is not subject to state taxation on the activities in issue under Indian-preemption analysis. The Department counters that preemption analysis is unnecessary because in contracting with the BIA, Appellant contracted with the federal government, not an Indian Tribe, making Appellant liable for transaction privilege tax. *See United States v. New Mexico*, 455 U.S. 720

(1982) (contractors performing services for federal government subject to gross receipts tax). However, in a recent decision involving the same taxpayer and the same issue, the New Mexico Court of Appeals held that although certain construction was BIA-funded and administered pursuant to a contract between the BIA and the contractor instead of between a tribe and the contractor, application of preemption analysis to the issue of taxation was not precluded. *Blaze Const. Co. v. Taxation and Rev. Dep't of New Mexico*, 871 P.2d 1368 (N.M. Ct. Appellant. 1993).[2] The Board agrees. As noted in *Blaze*, the BIA may be a federal agency, but it is a federal agency with a special relationship with Indian Tribes. *Id.* at 1370; *see also, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-48 (1980) (describing BIA involvement in tribal business enterprises). Therefore, Indian-preemption analysis is appropriate.

Appellant contends that Indian-preemption analysis requires tribal interests be considered and weighed against state and federal interests. *See Ramah Navajo School Bd. v. New Mexico*, 258 U.S. 832 (1982); *Bracker*, 448 U.S. at 146-48. The Department argues, however, that the Supreme Court recently abandoned this balancing-of-interests standard, looking instead to express or implied Congressional intent to preempt state tax. *See Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698 (1989) (upholding the imposition of a state severance tax

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[2] Under circumstances virtually identical to those now before this Board, the *Blaze* court held that New Mexico's gross receipts tax on Blaze's road construction activity was preempted.

imposed on a non-Indian company engaged in oil and gas production on the reservation). However, a review of *Cotton Petroleum* confirms the relevance of the analyses set forth in *Ramah* and *Bracker*.

In *Cotton Petroleum*, the Court noted that "[e]ach case requires a particularized examination of the relevant state, federal, and tribal interests." 109 S. Ct. at 1707 (citing *Ramah, supra*). In weighing these competing interests, the Court concluded that New Mexico's severance tax on oil and gas leases was valid because:

1. The state provided substantial services to the Tribe and Cotton Petroleum that justified the tax;[3]
2. the tax imposed no economic burden on the tribe; and,
3. the federal and tribal regulation of the activity was not exclusive, since New Mexico regulated the spacing and mechanical integrity of the on-reservation wells.

Id. at 1701. In contrast, the lack of any state contribution to the tribal interests taxed in *Ramah* and *Bracker* made the impact on tribal interest substantial. *Id.* at 1711-1712.

Addressing the burden on the tribe, the *Cotton Petroleum* Court found that although the oil severance tax would impose a burden on the tribe by reducing the value of its leases, the burden did not substantially affect the marketability of the tribe's oil. *Id.* at 1713. Therefore, the Court ruled that absent a "special factor" such as a

[3] Cotton Petroleum conceded that New Mexico provided its operations with nearly $90,000 between 1981 and 1985.

lack of regulatory interest or a lack of a justification to tax as found in the *Ramah* and *Bracker* decisions, the impact to the tribe's well-being was "too indirect and too insubstantial" to support preemption. *Id.*

In this case, the State of Arizona has similarly failed to identify any valid interest it has in Appellant's construction activities. The State neither provides services to Appellant's operations nor regulates its activities. Conversely, the tribes in Arizona have an interest in the preemption of Arizona's transaction privilege tax because the tax reduces the amount of funds available for roadway improvement and construction on reservations in Arizona, which in turn detrimentally impacts the welfare, safety, financial well-being, and sovereignty of tribes and tribal members.

Furthermore, the federal interest is evident. Pursuant to its authority under Title 25, the BIA has promulgated road construction regulations giving it complete authority over all aspects of contracting on reservations (*see, e.g.*, 48 C.F.R. Part 1 *et seq.* (Federal Acquisition Regulations)), as well as the selection of projects, the approval of location and design, and the construction, improvement, maintenance, use and policing of roadways. *See generally* 25 C.F.R. §§ 170.1-19 and Part 11.

CONCLUSIONS OF LAW

The Board concludes that the competing federal, state, and tribal interests at stake in this case compel preemption of Arizona's transaction privilege tax. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698 (1989); *Ramah Navajo School Bd. v. New Mexico*, 258

U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Blaze Const. Co. v. Taxation & Rev. Dep't of New Mexico*, 871 P.2d 1368 (N.M. Ct. App. 1993).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is granted and the final order of the Department is vacated.

THIS DECISION BECOMES FINAL upon the expiration of thirty (30) days from receipt, unless either the State or the taxpayer brings an action in Superior Court as provided in A.R.S. § 42-124.

DATED this 18th day of July, 1994.

STATE BOARD OF TAX APPEALS

Stephen P. Linzer, Chairman
Division Two

BEFORE THE
ARIZONA STATE BOARD OF TAX APPEALS
DIVISION TWO
STATE OF ARIZONA
1501 West Washington Street
LEVEL 2 NORTH - SUITE 224
Phoenix, Arizona 85007

BLAZE CONSTRUCTION COMPANY, INC., Appellant,	)	
vs.	)	Docket No. 950-92-S
ARIZONA DEPARTMENT OF REVENUE, Appellee.	)	

Joint Statement of Stipulated and Contested Facts

Pursuant to Rule R-16-?-114 of the Arizona State Board of Tax Appeals, and the request thereunder by Division Two, appellant Blaze Construction Co. and appellee the Arizona Department of Revenue hereby file this joint statement of stipulated and contested facts in the above captioned matter.

I. Procedural History

On April 7, 1992, Blaze Construction Company, Inc. ("Blaze") filed an appeal to the Board of Tax Appeals, Division Two (the "Board") from an order dated March 6, 1992, issued by the Director of the Arizona Department of Revenue ("Arizona"). This order, affirming a decision dated September 27, 1991, by a Department Hearing Officer, denied Blaze's protest dated November 14, 1990, of a

sales tax deficiency assessment in the amount of $1,200,581.54 ("Assessment"). In the Assessment, the Department of Revenue has levied its transaction privilege (sales) tax ("Sales Tax") against gross receipts received by Blaze pursuant to a number of contracts with the United States Bureau of Indian Affairs ("BIA") and tribal housing authorities (collectively, the "Contracts"). The Contracts were for road and housing project construction work located entirely on Indian reservations.

In its appeal, Blaze has requested that the Board reverse the decisions of the Department of Revenue and find that the Department is without authority to assess its Sales Tax against the gross receipts received by Blaze under the Contracts.

This document outlines the facts to which the parties stipulate, as well as the facts in contention. This stipulation is entered into for the purposes of this proceeding only, and may not be used for any other purpose. The parties reserve the right to supplement or amend this Joint Statement of Stipulated and Contested Facts as additional information becomes available.

II. Stipulated Facts

A. Posture of the Parties

1. Appellant Blaze Construction Company, Inc. is a 100% Indian-owned company incorporated under the laws of the Blackfeet Tribe. Blaze works exclusively on construction projects on Indian reservations located within several states, including Arizona.

2. Blaze's sole owner is William Aubrey, a member of the Blackfeet Tribe.

3. Blaze does not own or maintain any offices, construction yards, or other facilities in Arizona, other than on Indian reservations.

4. Blaze is not required by the BIA or any other reservation contracting agency to be licensed by Arizona, and in fact, Blaze is not licensed by the State.

5. Appellee Arizona Department of Revenues is seeking to collect its Sales Tax on gross receipts paid to Blaze between June 1, 1986, and August 31, 1990, pursuant to the Contracts which the State has identified in a series of spread sheets (attached as Exhibit A).

B. Overview of the Projects at Issue

6. For the projects at issue, Blaze either built Indian housing or residential streets around Indian housing or built or rehabilitated roads which improved access to local tribal government buildings or housing, farms, ranches, or schools.

7. Each of the Contracts was entered into between Blaze and either the BIA or a local housing authority.

C. Descriptions of Specific Projects

1. Project Located in New Mexico

8. The Paraje Street and Roads Project (Job No. 8630) was performed on the Laguna Indian Reservation in New Mexico.

2. Projects on the Navajo Indian Reservation

9. All of the projects within the Navajo Reservation were intended to improve access to Indian housing, local government "chapter" houses, and BIA schools. These roads are used predominately by Navajos but are open to the general public.

10. The Lower Greasewood Project (Job No. 90406; Contract No. CBN00001390) included the pavement of approximately 13 miles of BIA/Navajo Route 15 from BIA/Navajo Route 6 northeast to the Village of Lower Greasewood). The Project improved access to Lower Greasewood and a BIA school. The segment of BIA/Navajo Route 15 paved by the project is located at its closest approximately 25 miles by road from the Reservation border, in this case a point approximately 15 miles north of Holbrook, Arizona. The Project is located approximately 19 miles from Arizona Route 77, which leads from the Reservation border to Holbrook.

11. The Sanders Housing Project (Job No. 89405; Contract No. CBN00003689) provided residential streets around Indian housing built by the Hopi-Navajo Relocation Commission. The Project is located near Sanders, Arizona and is within a few miles of Interstate 40.

12. The Blue Gap Road Project (Job No. 89401; Contract No. CBN0000789) involved overlayment of approximately 7 miles of BIA/Navajo Route 29 (from BIA/Navajo Route 4 north to the Blue Gap Chapter House) and pavement of the Chapter House parking lot. The Project improved access to the Chapter House and scattered Indian housing. The road also serves as a school bus route. The Blue

Gap area is located in a sparsely populated area near the center of the Navajo Indian Reservation, which contains no buildings other than the Chapter House and Indian housing. The segment of BIA/Navajo Route 29 paved by the Project is located at its closest at least 105 miles by road from the Reservation border, in this case at Chambers, Arizona. The Project is located approximately 22 miles from U.S. Route 191.

13. The Cottonwood Road Project (Job No. 90413; Contract No. CBN000001690) involved pavement of approximately 8 miles of BIA/Navajo Route 25 (from BIA/Navajo Route 26 north to BIA/Navajo Route 251 near the Village of Salina). The Project improved access to scattered Indian housing and the Cottonwood Chapter House. The road also serves as a school bus route. The segment of Route 25 paved pursuant to the Project is located at its closest at least 80 miles by road from the Reservation border, in this case at Chambers, Arizona, and is located in a remote area near the center of the Navajo Indian Reservation. The Project is located approximately 15 miles from the U.S. Route 191.

14. The Inscription House Project (Job No. 8820; Contract No. N00 C 88C 0098) included pavement of BIA/Navajo Route 16 (from Inscription House to a point approximately 9 miles north) and pavement of the Chapter House parking lot. The Project provided improved access to the Inscription House Chapter House and a BIA school. The segment of BIA/Navajo Route 16 paved by the Project is located in a remote area of the Navajo Reservation at its closest at least 60 miles by road from the Reservation border, in this case at Page, Arizona. The

Project is located approximately 10 miles from Arizona Route 98.

15. The Low Mountain #1 Project (Job No. 8731; Contract No. N00 C 87C 0071) and Low Mountain #2 Project (Job No. 8812; N00 C 88C 0076) involved work on one roadway which was completed through two contracts. The first contract involved grading the Low Mountain Chapter House parking lot and approximately 13 miles of BIA/Navajo Routes 60, 65, and 67 leading to the Chapter House and a BIA school, and the second contract involved paving the same road and parking lot. The segment of roadway improved by this project is located in a remote area of the Navajo Reservation at least 50 miles by road from the Reservation border, in this case at a point on the Reservation border approximately 15 miles by road north of Holbrook, Arizona. The Project is located approximately 13 miles by dirt road from Arizona Route 264.

16. The Ganado and Cornfields Overlay Roads Project (Job No. 8849; Contract No. NOOC88C0116) involved overlayment of approximately 8 miles of BIA/Navajo Routes 15 and 15A and pavement of the Cornfields Chapter House parking lot. The Project improved access from the Village of Cornfields to Ganado High School and improved access to the Cornfields Chapter House. The Project is located at least 44 miles by road from the closest point on the Reservation border, in this case at Chambers, Arizona. The Project connects to Arizona Route 264.

17. The Holbrook Roads Project (Job No. 8740; N00C14204959) involved overlayment of BIA/Navajo Route 6 from its connection on the Reservation border to

Arizona Route 77 to a point approximately 8 miles North. This Project improved the route between the south-central area of the Reservation and Holbrook, Arizona, which is located approximately 15 miles by road south of the Reservation border.

18. The Red Valley Road Project (Job No. 90408; Contract No. CBN00002590) involved the pavement of BIA/Navajo Route 63 from the Village of Red Valley to a point approximately 5 miles north. The Project improved access to new Indian housing. The closest location within Arizona, not within the Navajo Reservation, from the Project is at least 120 miles south to the Reservation border at Chambers, Arizona, via BIA/Navajo Route 13 and U.S. Route 191, although a portion of BIA/Navajo Route 13 is unimproved dirt roadway through mountain passes and is impassable in bad weather. By this route, the Project is approximately 36 miles from U.S. Route 191. To reach the closest point in Arizona not within the Reservation on improved roads, the shortest route is at least 150 miles via U.S. Route 666 through Gallup, New Mexico, to Sanders, Arizona.

19. The Chinle Roads Project (Job No. 8024; Contract No. N00C88C0093) involved pavement of approximately 20 miles of BIA/Navajo Route 64 from the Village of Chinle to BIA/Navajo Route 12, and the pavement of approximately 15 miles of BIA/Navajo Route 12 from the Village of Lukachukai Southeast to Tsaile. The Project provided improved access to a number of villages and the Canyon de Chelly National Monument. The Project is located at its closest at least 70 miles by road from the Reservation border, in this case at Chambers, Arizona. The Project is located within five miles of U.S. Route 191.

3. Project on the Hopi Indian Reservation

20. The Hopi Roads Project (Job No. 8858; Contract No. H50C14209138) involved grading, drainage, and pavement of BIA/Hopi Routes 17, 503, and 508 and pavement of the parking lot at the Hopi Tribal Government Center on Second Mesa. The Project improved access to Hopi housing and the Tribal Government Center. The Project area is located at its closest at least 50 miles by road from the Reservation border, in this case at a point approximately 20 miles by road from Winslow, Arizona. Portions of the Project connect to or are near Arizona Route 264.

4. Project on the Fort Apache Reservation

21. The Fair Road Project (Job No. 8606; Contract No. H50C14206292) involved pavement of approximately 7.5 miles of BIA/Fort Apache Routes 1, 4, 5, 7, 45, 47, and 71 near the Village of Fort Apache. The area of the Project is located at least 20 miles from the Reservation border at a point near Pinetop-Lakeside, Arizona. The Project is located near Arizona Route 73.

5. Projects on the Colorado River Indian Reservation

22. The Parker Colorado River Roads Project (Job. No. 89403; Contract No. CBH50921889) and the Colorado River Roads Project (Job No. 90407; Contract No. CBH500189) involved pavement of local roads between irrigated fields located approximately 20 miles and 25 miles south, respectively, of the Reservation border north of Parker, Arizona. These roads were built to allow

farmers to move their equipment between irrigated fields. The Projects are located approximately 15 to 20 miles from Arizona Route 72.

23. Another Project on the Colorado Indian Reservation, also called the Colorado River Roads Project (Job No. 90410; Contract No. CBH50022590), involved the pavement and marking of approximately 9 miles of BIA/Colorado Indian Reservation Route 1 and the installation of approximately 20 miles of mile post markers on the same road. The segment of roadway improved by the Projects starts approximately 5 miles north of the Reservation border at Ehrenberg, Arizona. The Project is located approximately 5 miles from Interstate 10.

6. Projects on the Papago Indian Reservation

24. The Sells Road Project (Job No. 8842; Contract No. H50C14207324) involved grading, drainage, and pavement of approximately 6 miles of BIA/Papago Route 34 five miles North of the Village of Sells. The Project improved access to scattered Indian Housing. The segment of road improved by the Project is located at its closest at least 30 miles by road from the Reservation border, in this case at a point approximately 30 miles by road west of Tucson, Arizona. The Project is located near Arizona Route 86.

25. The Papago #2 Project (Job No. 89404; Contract No. CBH50921589) involved pavement of approximately 7 miles of BIA/Papago Route 19 south of the Village of Sells. The Project improved access to scattered Indian housing. The segment of road improved by the Project is

located at its closest at least 25 miles by road from the Reservation border, in this case at a point approximately 30 miles by road west of Tucson, Arizona. The Project is located near Arizona Route 86.

26. The Papago Roads Project (Job No. 8717; Contract No. H50C14208293) involved the construction of two concrete bridges, the extension of culverts, the installation of guardrail and cattleguards, and the reconstruction of dip sections on BIA/Papago Route 19. The Project improved access to scattered Indian housing. The segment of road improved by the Project is located at its closest at least 25 miles by road from the Reservation border, in this case at a point approximately 30 miles by road west of Tucson, Arizona. The Project is located within 10 miles of Arizona Route 86.

7. Projects on the San Carlos Indian Reservation

27. The first San Carlos Roads Project (Job No. 90401; Contract No. CBH50013190) involved the grading, drainage, and pavement of approximately 7 miles of residential streets around Indian housing and the Tribal Government Center within the Village of San Carlos. The Project improved access to the housing and Government Center. The area of the Project at its closest at least 17 miles by road from the Reservation border at a point two miles by road east of Globe, Arizona. The Project is located near Arizona Route 170.

28. The second San Carlos Roads Project (Job No. 90412; Contract No. CBH500190) involved the pavement of approximately 17 miles of BIA/San Carlos Route 8,

located approximately 10 miles Northeast of the Village of San Carlos. The Project improved access to tribal cattle ranches. The Project is located at its closest at least 30 miles by road from the Reservation border at a point two miles by road east of Globe, Arizona. The Project is located approximately 10 miles from U.S. Route 70.

D. Nature of the Relationship Between Arizona and Blaze

29. On the projects under consideration, Blaze was not provided any specific services by Arizona, except Blaze's use of State roads to transport equipment from reservation to reservation.

30. Blaze paid fees relating to its use of the Arizona highways during the period of the Assessment, including purchase and maintenance of its Arizona motor vehicle license.

31. The State had no role in the planning, permitting, or other development of the projects, and otherwise had no authority over or role in the formation of the Contracts entered into between Blaze and the BIA.

32. Arizona provided no employment, construction, or quality or safety inspection services related to the projects.

33. Arizona provides no maintenance or regular police services related to any road at issue.

34. Approximately 85% of the persons employed by Blaze to complete the Projects were Indians.

35. All employment services related to the projects were provided by tribal employment referral services, and not by Arizona.

BEFORE THE
ARIZONA DEPARTMENT OF REVENUE
1600 West Monroe
Phoenix, Arizona 85007

In the Matter of:	)	
Blaze Construction Company, Inc.	)	Docket No.
	)	910130-S
	)	

TRANSCRIPT OF HEARING
BEFORE DEPARTMENT OF
REVENUE HEARING OFFICER

JULY 23, 1991

Michael Worley, Hearing Officer, Presiding

For the Appellant: Daniel S. Press
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[Transcript, Page 1]

MW: Okay, we're on the record. Today is Tuesday, July 23rd, 1991. It's 8:30 a.m. This is the time set for the hearing in the protest of Blaze Construction Inc., our Case No. 910130-S in connection with the taxpayer's protest of an assessment of additional errors on the privilege tax, penalties, and interest for the audit period June 1986 through August 1990. My name is Michael Worley. I'm the hearing officer. For the record, I would like those present to state their names, starting on my left please.

PI: Patrick Irvine with the Attorney General's Office.

PW: Paul Wood, Blaze Construction Company

EW: Eddie Ward, Bureau of Indian Affairs, Contracting Officer

BA: Bill Aubrey, Blaze Construction

DP: Daniel Press, Attorney for Blaze Construction

MW: Okay, I'm going to assume that Mr. Aubrey, Wood and Ward are here as witnesses and I'll just swear them in now and save time later. So would you three gentlemen please raise your right hand? Do you swear in the testimony that you are about to give in this proceeding that you will

* * *

[Transcript, Page 11]

DP: Does Blaze have any offices, yards, or any other facilities in Arizona other than on Indian reservations?

BA: No.

DP: So your entire operation in Arizona is located on Indian reservations?

BA: Yes.

DP: In carrying out your BIA road project, do you receive any services from the State? Any police protection, inspection – ? Do you ever even see a state official on this project?

BA: No.

[Pause]

DP: On these projects, did your subcontractors and suppliers pay state sales and use tax?

BA: In many instances, they charged us the taxes.

DP: So that was added on to the cost of the subcontract?

BA: That's correct.

DP: So, they were not exempt, and you did not receive or apply for a certificate to exempt your subcontractors?

BA: It was my understanding at the time.

DP: Because you are not a licensed contractor in the State of Arizona.

BA: That's right.

* * *

[Transcript, Page 17]

DP: Okay. Fine. The next witness we'll call is Paul Wood.

DP: Please state your name, address, title.

PW: Paul Wood, 1000 Gabaldon, NW, Albuquerque, New Mexico 87104. General Manager of the Road Division of the Southwest with Blaze Construction Company.

DP: In that capacity, you oversee – manage all of Blaze's road construction projects in the State of Arizona?

PW: Yes, sir, that is correct.

DP: Do you visit every job?

PW: Yes, I do.

DP: In that capacity, have you ever received any state services in carrying out any of these road projects?

PW: No, sir.

DP: You've never seen a state official on the project to provide inspection services?

PW: That's correct. No state official at all.

DP: Police? If you have a problem on the job, and you need police services, what police –

PW: Well, Navajo we get a hold of – Navajo police handle it. In San Carlos, the San Carlos police handled it. Papago the Papago County, but no – no state agency at all.

* * *

[Transcript, Page 23]

PW: Yes we are.

DP: What is the procedure?

PW: Well, the trucks that we have over there we have to register them – we register them in Arizona and New Mexico. We pay a tax – just a regular road tax to the State of Arizona for the trucks to haul on it.

DP: When your trucks are hauling to the site, and you buy gasoline for them, are you required to pay the state gasoline tax?

PW: Yes, we are.

DP: What I would like to do now is go down the list of road projects that the State is assessing Blaze on, and have you describe a little bit about where those roads are located and who uses them. Start with the ones off Navajo and other reservations and move back to Navajo. It's about – as I can tell, it's about 50/50. Ah, San Carlos road project – describe where that is and who intends to use those roads.

PW: San Carlos, that's a street job there in San Carlos Reservation. Within the village of San Carlos. It's residential streets. And when you put in curb and gutter and pave it, the people that use it are the local people living there.

DP: San Carlos is a reservation town?

[Transcript, Page 24]

PW: That is correct.

DP: The majority of people there – or the vast majority are Indian?

PW: I'd say 100%. Whatever it is, I don't know.

DP: Is San Carlos also the tribal headquarters – the location of the tribal headquarters?

PW: That is correct.

DP: And these roads – streets around houses are also around the governmental buildings?

PW: That is correct.

DP: Both?

PW: Both.

DP: Okay. Parker – there are two Colorado River jobs, one is listed as Parker, Colorado and the other is

listed as Colorado River. My understanding that Parker, Colorado is within the Colorado River Reservation.

PW: Yeah. Both of them are about 15 miles south of Parker, Arizona. They're on the reservation there. And these roads were built for the farmers doing irrigation there – no main travel road, it's just between the fields. We have big alfalfa fields there, and they just went in and put new roads of gravel and paved it so that they could have a way to get the tractors up and down the road.

DP: This is into an irrigated farm?

[Transcript, Page 25]

PW: That is correct.

DP: Do you know whose irrigation system that is?

PW: It's the tribe's.

DP: Funded through the Bureau of Indian Affairs?

PW: Yes, sir.

DP: So these roads provide access to BIA irrigation projects.

PW: That's correct.

DP: Sells – Sells, Arizona – which is on the Papago Reservation?

PW: Well, there's three jobs at Sells and that reservation. One of them was building a road into Ak Chin from a BIA road – no state roads in that area at all.

DP: Where did – did that road go to a particular location like the schools . . . ?

PW: It went to the Ak Chin school.

DP: Is that a state school or a BIA school?

PW: BIA school.

DP: And the second road –

PW: – second one started right there at Sells, and went straight south, almost 18 miles, and it was an extending of the concrete boxes. And that went out to scattered housing – Blaze had built some scattered houses down right through there. It was – it went all the way to the Mexican line – Mexican border. It was the last house that was built there – an Indian house.

[Transcript, Page 26]

DP: You said Blaze built the houses. Who has funded those houses?

PW: HUD.

DP: Through the Tribal Housing Authority?

PW: Yes, sir.

DP: So the road provided access for the Indian houses –

PW: – correct –

DP: – funded by HUD through the Papago Indian Housing Authority. Okay and then there was the third project in Sells – Sells –

PW: – well, actually it was about 15 miles from Sells. It was an overlay – a job for a school route. It just went back in the – dead ended, in fact, there was about 100 houses back in through that area, and they just overlaid the road had been there 10-12 years.

DP: What kind of houses were those?

PW: Indian housing.

DP: Had they been HUD funded Indian houses?

PW: Yes.

DP: So that road also was to provide access for Indians living in HUD Indian houses?

PW: That is correct.

* * *

[Transcript, Page 40]

DP: Summarized, you do new – you build new roads.

EW: New roads. Overlay existing roads and chip seal existing roads.

DP: Chip seal is kind of like filling in tracks and potholes?

EW: Well, it's kind of just putting a very thin layer over potholes.

DP: Where does the BIA get the funds to build the roads?

EW: Federal Highway administration.

DP: Prior to 1983, where did you get the money?

EW: It came directly down from the Bureau –

DP: – from Congress to the Bureau –

EW: – yes.

DP: Okay. Did anything else change in the way you designed and built roads before and after the money came directly to the Bureau from Congress as after it came from – through the Federal Highway Administration?

EW: Nothing changed. No.

DP: What role does the Federal Highway play in the road projects?

EW: Ah, we use the Federal Highway specifications and, in the State of Arizona – in Phoenix – Federal Highway Administration approves our specifications and our projects before we put them up for bid.

DP: Did they do this in the old days before '83 as well?

[Transcript, Page 41]

EW: Same thing.

DP: Okay.

EW: In the State of New Mexico, in Santa Fe, they – we get approval from them before.

DP: After they approve your specs, do they show up on the job? Do they do an inspection?

EW: No. Once in a while they'll come out maybe for a final inspection, but very seldom. And I make most of the finals myself, or accept them with my engineers. I haven't been with a Federal Highway Inspector in a long time.

DP: So you – BIA awards the contracts –

EW: – and we close them out and accept them.

DP: And who inspects them?

EW: Our own people. We have our engineers that go out, and I'm an engineer myself.

DP: They are out on the job on a regular basis?

EW: Yes.

DP: Doing inspections –

EW: – yes, we have –

DP: – and testing –

EW: – five agencies in the Navajo, and we have a roads office at each agency. And they inspect – supervise as part of

[Transcript, Page 42]

the inspection. Oversee Blaze under the agency that they have jurisdiction in.

DP: What's your annual budget for road construction?

EW: Approximately $20 million.

DP: Is that sufficient to meet all of the road and design?

EW: No.

DP: Do you ever return any money at the end of the year because there's no need for the money?

EW: No, as a matter of fact, we have been fortunate to get more.

DP: Because the need is so great on it?

EW: Well, the – it's the – the need is there, but the procedure is that if the other area offices, which we have 12 of, on June 30th if they do not have a commitment for a contract – either it's advertised out in the street or getting ready to go – they have to return the money, and then they make a distribution on a first-asked basis. The Navajos have been very fortunate in the last two, three, four years to – to get extra money that's left over for road construction.

DP: So, if the State imposes a 5% tax on the contractor, there's no other pot of money that you can turn to pay for that budget cut – it leaves 5% fewer roads?

[Transcript, Page 43]

EW: Yes, because in our specifications, we award – the contractor is required to include all local, state, federal taxes in the bid. So we don't know where he puts it, but on a $20 million – I'm just using mathematics here – if we get a $20 million budget, and they enforce 5 million – 5%, that would be $1 million, certainly we're not going to get – we'll get less roads then we would have with the full $20 million.

DP: Does the BIA take the position on whether the State has the authority to tax?

EW: No.

DP: Does the BIA require the contractor to have an Arizona license?

EW: No.

DP: When you have a project ready to go, do you develop an engineer's estimate of –

EW: – yes.

DP: What happens if the bid comes in below that estimate? What happens to the money –

EW: – it remains in the Navajo area budget to be used for – if we have $100,000 left on the bid, we can – we have numerous bids throughout the year. The money that is saved, we can build another road or a bridge or whatever. Use it for force account. On Navajo it's very unique. We have our

[Transcript, Page 44]

own force account crew which does a lot of grade and drain, and we employ 100% Navajo. It's government employed. And they do a lot of work, so if there's any money left there, we could get them to build a grade and drain project or a bridge.

DP: When you say "government", that's the BIA?

EW: Yes. We refer to it as the force account crew.

DP: These are government employees?

EW: Yes. Rather large – say – 150 to 200 employees. But the money stays back to – to answer your question – the money stays there until June 30th. If we have not spent, or obligated – it goes back just like under the Phoenix area. We all play by the same rules.

MW: Did you say "force" like f-o-r-c-e?

EW: Yes. Force account.

MW: How does the word "force" fit in there?

EW: I really don't know.

MW: Okay.

DP: It comes from the –

EW: – is it an acronym?

DP: No, it comes from the term "to do with your own forces".

EW: Oh, okay.

[Transcript, Page 45]

DP: It got shortened from that. It's a legal term – actually, it's a governmental term. When the government does work with its own forces, as against contracted.

MW: Okay, thank you.

DP: What are the existing roads like on the Navajo reservation? Good shape, bad shape?

EW: Well, there are some that are good, but they've – we've been so limited on the funds. And Navajo is the largest Navajo – or area office in the United States, and we just don't get enough money to – either to maintain them or upgrade them. They are in bad shape.

DP: You've driven around the reservation?

EW: Oh, yes. I've been all over that reservation.

DP: And those road are . . .

EW: Probably the same situation in most states. Not enough money to go around.

DP: How does the BIA decide what road to build in the Navajo – I gather there is an enormous need for both roads and road improvements.

EW: Okay, the tribe has a roads committee which sets the priorities. A lot of it has to do with politics, as I mentioned there's – they set up the priorities on a need out there for those roads. Both – they go to the area's chapter houses, school bus routes, probably, some schools

[Transcript, Page 46]

don't have a paved road going to the schools, so they may make that decision to put it on a priority. And they furnish that priority to the Branch of Roads, and then they make the decision as to the money – whether it's just going to be a grade and drain project from the outset or a grade and drain and paved, but that decision is made in the Branch of Roads.

DP: So the tribe sets the priorities –

EW: – yes –

DP: – and the BIA implements the existing projects.

EW: Yes.

DP: You indicated before, there's never enough money to meet all of the priorities set by the tribes.

EW: Right.

DP: Does the tribe contribute to the road projects in forms of right-of-way or other valuable –

EW: Yes, they grant the Bureau of Indian Affairs a right of way to construct the project. We cannot do it without their giving us the right of way.

DP: And that's tribal land.

EW: Yes.

DP: Do you – you have to compensate them for the?

EW: No.

[Transcript, Page 47]

DP: If this was privately owned land, would you have to compensate them?

EW: I am sure they would ask for something for – to give us the right of way.

DP: So the tribe is making a valuable contribution –

EW: – yes –

DP: – cost of the road. I'd like to quickly go over the same issue I went over with Paul Wood which is describe the roads. We'll want just to hear from your perspective. You've worked 30 years out at the Navajo – 25 years at the Navajo. Where the

roads go and why they were built and . . . start with the Holbrook Road. Where does that road . . . ?

EW: That road runs north and south from – like Paul mentioned – from the reservation line north, up to – I believe it's Keams Canyon – all the way across there. And there's various trading posts, schools, in that area. And the road project that they worked on was an overlay project of an existing road.

DP: Is that a state road or a BIA road?

EW: BIA.

DP: How about up to the reservation boundary?

EW: I believe that's state.

[Transcript, Page 48]

DP: And then the state responsibility ends right at the boundary?

EW: Yes.

DP: So the state overlays and does everything else right out to the reservation boundary and then –

EW: – yes –

DP: – they have no more responsibility?

EW: No.

DP: Okay. The Sanders Housing Project . . . ?

EW: That particular contract was to build paved streets, put in curb and gutter for the relocation people that were relocated by the Relocation Commission.

DP: Would you provide a little background on what the Relocation Commission is and why these people were relocated?

EW: To – just from my knowledge, they relocated them from under that Navajo-Hopi dispute, and they put them in an area there south of Sanders and the Relocation Commission contracted – we handled some of those housing contracts for the people that were moved there. And then we put out a bid for paving of the streets.

DP: So, all of the occupants of the houses were –

EW: – relocatees. Navajos –

DP: – Navajo relocatees.

[Transcript, Page 49]

EW: Yes.

DP: And where did the money come from? Did it come from BIA appropriations?

EW: I believe that the money for that – for that particular project – was a special appropriation for the Navajo-Hopi contract. We got the bids for that project.

DP: To your knowledge, in my experience, the State does not provide any assistance or anything on the list that you went over with Paul. We maintain them. You mentioned snow removal. We also do that on a yearly basis. As Paul mentioned, if the – if he's working in an area on a contract like, say, the Red Valley one, we contract with them because they have some equipment out there to remove snow. And we pay them for it. But other than that, the Bureau will do it, but the Bureau is very limited on equipment, and it's very beneficial for contractors to cut – who got a grader out there to do it – we just pay them back. The State doesn't main – do any snow removal or any maintenance on – on the reservation.

DP: While we are on the subject, there are some state roads on the reservation?

[Transcript, Page 50]

EW: Yes, yes. There are some main arteries, like from Shiprock all the way to Tuba City. I believe the road from Window Rock all the way to Tuba City is a state road. Yes, there are some.

DP: In the 25 years you have been on the reservation, are you aware of any roads – new roads that the BIA has built?

EW: New roads?

DP: New roads.

EW: Yeah –

DP: – not the BIA, the State has built, excuse me.

EW: No, no.

DP: In other words –

EW: – no –

DP: – the State hasn't built a foot of new –

EW: – no.

DP: Now they – you said they do have some roads that you maintain took over. Can – can – after you build a road – BIA builds a road – can you turn it over to the State for maintenance?

EW: Yes.

DP: And after that, they are responsible for –

EW: – right. To maintain it.

DP: Does that include doing overlay?

EW: Whatever it takes to keep it in good –

* * *

[Transcript, Page 53]

DP: Okay. To your knowledge, has the State assumed maintenance of that road?

EW: No.

DP: It's still a BIA road?

EW: Uh huh.

DP: All right. Inscription House . . . ?

EW: That's a – that's a rather large area going to the Navajo Mountain School. Pretty rough terrain, so we've let out, I believe, two or three contracts leading up to the school. We were maybe half way there.

DP: What kind of school is that? A state school or BIA school?

EW: BIA school. Small, small school.

DP: Has the – that was a new road?

EW: Yeah.

DP: Has the State agreed to assume maintenance responsibility.

EW: No. That's – that's still in our Indian contracting department.

DP: And is that a main artery going across the state?

EW: No. No, that just goes to a very isolated area. Matter of fact, I used to know the principal there – it was so bad that when she went on leave at Christmas, I think they went in with a helicopter and got her out because of the snow and terrain.

So they finally – finally put that on a priority to get it – get it paved up in there.

* * *

[Transcript, Page 58]

DP: So, to summarize, all of these roads are remote roads that effectively dead end at BIA school or the Navajo chapter house.

EW: Uh-huh, dead end, or most – some of the roads are existing roads for use of the local public there from one route to another.

DP: In the times you go out there, do you see many non-Indians?

EW: No. Not in these particular routes.

DP: Are these some of the most remote areas on the map?

EW: Yes. The Low Mountain, Cottonwood, Blue Gap, those areas are right in the center of the reservation. Very remote.

DP: Are there places out there where there is not even electricity?

EW: Yes. I'd say one – a lot of the Navajos out there don't have electricity in some of the areas like Navajo Mountain. I believe the school up there – the last time I was there they had a generator.

DP: Why is there a BIA school there?

EW: I don't know. I don't know. It's an old – matter of fact, I think that the buildings there are adobe. Kind of a round Navajo style adobes, from what I recall at the Navajo school.

[Transcript, Page 59]

DP: Do you know where the nearest public school is? From Navajo Mountain?

EW: From Navajo?

DP: Navajo Mountain.

EW: I would say at – well, I'd say that the closest would be Tuba City.

DP: Or Cianta or Page?

EW: Or Page.

DP: How far is this to the nearest school?

EW: Oh, it's quite a ways.

DP: 100? 70?

EW: I'd say a good 70 to 100 miles from – from the Navajo Mountain school to Tuba City which is the agency headquarters. Or they have a high school – the school there on Navajo Mountain is just a small-small school.

DP: And, to summarize, you said that the State has not taken over maintenance of any of the roads that BIA – that Blaze has built?

EW: Not to my knowledge, no.

DP: Okay. And the roads that are overlays and chip and seals are all roads that the BIA is responsible for maintaining –

EW: – we're still maintaining those, yes.

[Transcript, Page 60]

DP: What services does the State provide the BIA under contract [inaudible], you've mentioned it before.

EW: None, to my knowledge.

DP: Could you explain the Buy Indian Act? How it works and how you use it on road construction?

EW: The Buy Indian Act was a law passed where the Bureau is required, when they procure for any services, supplies, or anything that they need, that they have to set it out under Indian preference, where only Indian contractors are allowed to compete or bid.

DP: Okay. Do you put out all of your road contracts out under . . . ?

EW: Yes, every one.

DP: Okay, and every one that Blaze has won, they won under a –

EW: – under a competitive seal bid procedure.

DP: That means that only Indians are allowed to bid, but the bid goes to the lowest –

EW: – responsive Indian bid –

DP: – responsive Indian bid –

EW: – yes.

DP: When the project is on a particular reservation like Navajo, do you give special preference to a Navajo contractor?

EW: No. No.

[Transcript, Page 61]

DP: It's all – the Bureau doesn't distinguish between Navajo, for example, Blaze is a Blackfeet.

EW: No. It's a Indian contractor or Indian individual residing on or living near a reservation. They can

come from anywhere. But he has to be an Indian-owned firm.

DP: Speaking hypothetically, but this might actually have happened, what if the President of the Navajo Nation, Peterson Zah, came to me and said: "I want you to give a special preference to Navajo contractors over other Indian contractors when you put these projects out to bid."

EW: I couldn't do that.

DP: Has the tribe ever requested . . . ?

EW: No. They've tried to enforce Navajo preference in hiring. And the same stipulation applies in there, that if the contractor and the subcontractors were required to hire Indian people living on or residing near the reservation, and they have tried to get me to impose the Navajo preference which is recognized on the Navajo Reservation, but I inform the contractors, if they wish to do so, that's up to them, but legally, I cannot do that – distinguish between a Hopi or a Navajo as far as preference.

DP: And that's the BIA policy –

EW: Yes.

[Transcript, Page 62]

DP: If a Navajo contractor were not subject to state tax, and therefore had 5% while an Indian from another reservation were subject to state tax, especially if it was a 5% – the Navajo had a 5% fewer cost than the Indian from the other reservation, how would that affect the bid?

EW: Well, I – I can assume that they would have an advantage. Being that they didn't have to pay that 5%.

DP: So, it would effectively create a Navajo preference of some sort – a 5% bid preference for the Navajos over the other Indians.

EW: I would say so.

DP: And if Peterson Zah, the Navajo Tribal President, asked you to create a 5% differential for Navajo contractors, your answer would be . . .

EW: Well, when you say "create a 5% – "

DP: – it's saying that you can allow Navajos and non – and the other Indians to bid, but the Navajo's bid is with 5% – within 5% of the non-Navajo bid. To give a bonus, effectively, to Navajos. This bid is within 5% of the –

EW: – no, no, I couldn't do that. Like I say, it's a seal bid. That decision would have to be a contractor's decision whether you would include it in his bid or not, I don't get involved in that.

[Transcript, Page 63]

DP: So you couldn't include either – you couldn't even give an absolute preference to Navajos or a dollar preference –

EW: – no –

DP: – to Navajos.

EW: No.

DP: Let's talk about another law: the Self-determination Act. Could you explain how that Act works in regard to road construction?

EW: Well, that's another law that was passed by Congress that if the – any tribe wants a service or program that the Bureau of Indian Affairs is handling, for example road construction, they can request that service to be turned over to them.

DP: Can they do that for road construction? For example, the tribe says: we want to handle the road projects by – we want to let the bids, rather than the Bureau letting the bids.

EW: You can do that, yes.

DP: So, tomorrow the tribe could assume responsibility for awarding all of the road construction projects.

EW: That's right.

DP: If they did that, what would be different from the way it is now? Would the specs be different?

[Transcript, Page 64]

EW: Not the specs, no I think they would still have to follow the Federal Highway Administra – Highway Administration standards for roads and bridges because of the safety factors that Federal Highway follows in designing.

DP: And the Bureau would still be involved in –

EW: – yes, in any program that the tribe takes over, the Bureau still oversees it from a certain standing point.

DP: Whose roads would they be at the time the project was completed?

EW: They'd still be BIA roads [inaudible]. Under the 638 process, the tribes are slowly – that's the intent, Indian self-determination, they are slowly taking over some small programs on the reservation, but the Bureau is still – is kind of oversees them.

DP: So effectively, then, there are two options for road construction. You can let the contract – you being the BIA – or the tribe can let the contract. For all

significant differences, there is no difference in how the road gets built, who owns the road –

EW: – no –

DP: – what the specifications are. It's just who – whose name is on the contract.

EW: Yes.

DP: And all the tribe has to do is make a request to –

* * *

[Transcript Page 67]

DP: Do you also put the phone number of the state tax commission?

EW: No.

DP: I have no more questions, Mr. Ward.

MW: Mr. Irvine . . .

PI: Mr. Ward, you said the BIA takes no position on state authority to impose this tax. Is that correct?

EW: Could you rephrase that question?

PI: The BIA has no official position as to whether the State can tax the contractor doing business with the BIA –

EW: – no –

PI: – on the reservation?

EW: No, we don't get involved in that.

PI: The BIA has never issued a ruling or instruction saying no state tax –

EW: – no –

PI: – on these kinds of contracts –

EW: – no. We don't have that authority.

PI: Okay. And, to your knowledge, Congress has never passed a law saying this kind of tax can't apply. I gave you a lot of leeway.

DP: Yeah. Okay.

* * *

[Transcript, Page 71]

PI: To summarize it, if Blaze had to pay this tax, there is no provision for them automatically to be reimbursed by the government?

EW: No. No, I wouldn't make that decision unless there was enough documentation from a higher level authority – my solicitor – to, to say in fact – the general accounting officer or whatever – that oversees our, you know, the government agencies to allow that.

PI: You'd said the BIA gets some money from the Federal Highway Administration. Does the BIA get a lump sum?

EW: No. We used to. We used to years ago get $18 million and then we would spend it. But now we go through a procedure where – right now I got two projects advertised, and we go through the central office in Albuquerque and then up to the Federal Highway Administration in Washington, D.C. And we are in total daily contact with what we have going on as far as the money. We – when we have the bid opening, we immediately get on the phone, give them the amount, and the paperback process starts, but I do not award a project until we have what we call a – there's a word that they use – when actually we have the authority to spend that money for that particular – comes

down to the – to our finance office. It's what they call allotment authority.

[Transcript, Page 72]

PI: So does the Federal Highway Administration give you a project-by-project spending authority?

EW: Yes, yes.

PI: Does the Navajo Area Office deal directly with the Federal Highway Administration . . . as far as funding?

EW: I believe they do, through the central office in Albuquerque, yes. The Federal Highway Administration and our roads department work very closely on these projects because we are talking about a lot of money.

PI: So, well, let's go through the process, then. You decide you need a road in a particular spot . . .

EW: Right.

PI: What do you do as far as contacting the – as – yeah, go – just go through the procedure.

EW: Okay. I get a – the specification package from the Branch of Roads. We have our own design section. I put the boiler plate together, advertise it in the Commerce Business Daily for 45 days, set the bid opening date, put the complete package together. I conduct the bid openings, and we prepare what we call an "abstract of bids." It's a public opening. I take the abstract of bids over to the Branch of Roads. They get on the phone with the central office and give them the amount of the bid –

[Transcript, Page 73]

PI: – central off – excuse me, central –

EW: – Albuquerque.

PI: And that's of the Federal Highway Administration?

EW: No.

PI: That's the BIA – ?

EW: – BIA.

PI: Okay.

EW: In Albuquerque. And they – from there they take care of contacting the Washington office for the money to – to come down.

PI: The Washington office of the BIA?

EW: Yes. I'm not too – I don't talk to them people up there. I don't have any need to, so I really don't know who is talking to who. But our roads office calls the Albuquerque office, and then they take it from there. And they hold – they, they – what I send is a concurrence memo and the award to Blaze, or whoever was the low bidder. They do not reply until the money has been received by them. The money does not come to me. I just award the contract. Once they get the money, they're the responsible program office, then they come back, proceed in the award to the low bidder.

PI: Now, who are you talking about here? Who – who are you saying gets the money?

[Transcript, Page 74]

EW: The roads program office. See, in the Bureau there's different programs. Education, roads, just numerous – and they're – they get their own allotment authority from – from Washington.

PI: Where are they located? The roads program office?

EW: In – right down the hall from where I'm at. In Gallop.

PI: Okay. So the – so the money doesn't go through your hands, it goes through –

EW: – no –

PI: – somebody else in Gallup –

EW: – right, it goes – all money that – all we are is just a administrative office. The programs handle their own money. They are responsible to be sure that they take care of what they get. But it's done on a "per project" basis. In other words, for example, if I got eight projects out on the street advertised, the Albuquerque office knows which ones they are.

PI: Uh-huh.

EW: In other words, those wheels have already started moving in the direction that, when we had the bid opening, there is not much time involved in – in getting the money down to our – to our roads section.

[Transcript, Page 75]

PI: Who has allocated the money for the projects? You had mentioned – you set a – some parameters on what you think is a reasonable bid.

EW: No, the Branch of Roads comes up with what they call a "government design" estimate. A government estimate.

PI: And what is that?

EW: That's just the . . . the government's independent estimate of what that project should cost. That's derived from – they go back and make an analysis of the – what the projects are running. Cost of oil,

gas, isolation factor, wage rates. It's an independent estimate made up by them, taking all of these factors into consideration.

PI: You aren't involved in it?

EW: No, that is in a – that's in a sealed envelope that I receive the day of the bid opening, and I read that last. I read all the bids first and then I read the government's estimate. But at no time do I ever – I don't want to see it. What it is is just a sealed government envelope.

PI: What use do you make of it after you read it?

EW: We make a comparison. Because in a construction project, we have anywhere from 10 to 50 bid items. Different sizes of pipe, aggregate, dirt, and we – we come up with our own price per unit, and we compare it to what the contractors bid. They – they bid it the same way as we set it up,

[Transcript, Page 76]

which is called a "bid schedule". For different phases of work. Guardrail, painting. . . .

PI: Are you given an annual amount that you are expected to – or that you are able to – to set up for construction?

EW: The Branch of Roads is given some kind of an estimate as to what the – what they get yearly. It's been running about $18 million the last two or three years.

PI: Are you in the Branch of Roads?

EW: No.

PI: So they're given an estimate? It's not just a budget that they're free to spend?

EW: Well, it's – it's pretty close in that, when you are talking $18 million, that's pretty well what they tell them they're going to get for the year, and they prepare their program based on – around that $18 million.

PI: You'd talked about if – there are 12 areas. Is that 12 areas of the BIA?

EW: Yes.

PI: That if the money is not spent or committed by the end of the fiscal year, it can be reallocated to other areas?

EW: Yes.

PI: And the Navajo area has gotten such reallocations in the past?

[Transcript, Page 77]

EW: Yes. Navajo is the largest of the – of the area offices, other than Juneau in Alaska. But that's area-wide up there but as far as being with the public, Navajo is the largest. We get more than anybody.

PI: In absolute dollars or amounts that other areas don't spend?

EW: I would – I would – well, no, dollars. Our percentage of the budget that it comes out of Federal Highway, Navajo gets the largest percentage. They use a formula up there. I don't know how they come up with it, but it's – it's – Navajo is the largest.

PI: Okay. Going back to what you just said about money coming from the Federal Highway, in order to reach Navajo area, how does that money flow? Let's say it starts Point A, Federal Highways, then

down here is the Navajo area. Where does it flow? Does it get – go to Washington first and then come down?

EW: I – I don't know.

PI: Don't know?

EW: No. Because I'm not involved in that aspect of it.

PI: In order for the Navajo area to get these amounts that haven't been spent by other areas, that means the other areas didn't spend their amounts –

EW: – yes –

[Transcript, Page 78]

PI: – is that true?

EW: Yes. Like I say, there's a daily communication, especially down towards the end of the year, and June 30th, which is the deadline set by the higher-ups to either have a project ready for obligation for award, or advertised out in the street. There's quite a huge – lot of people involved in keeping track of what area has spent or what they have, especially down to the wire. And some don't spend it. They just don't have the project designed.

PI: Do you know if the Navajos have ever gotten some money from the Phoenix area?

EW: I heard that we had, but I don't get involved in that aspect of it either.

PI: So you just aren't as involved in the financing –

EW: – no –

PI: – part of it –

EW: – I'm not involved in the financing at all.

PI: You're involved in the real work –

EW: – administration, yeah. The problems.

PI: The real work. How many – how big is your – your own forces? I guess using force work. How many employees do you have in your department – that work for you on roads?

[Transcript, Page 79]

EW: Oh, we have five agencies under Navajo, including irrigation projects. I couldn't tell you. It's-it's large.

DP: Can I – you're asking how many people are out building roads or how many people work for him through the contract administration?

PI: Who work for the BIA – doing – as actual employees doing road work.

DP: You mean the force account, you're talking about – who are out there with shovels and –

PI: – actual employees of –

EW: – let me, let me –

PI: – the BIA –

EW: – let me explain that. We have five agencies, and each agency has a road office. Okay. They have inspectors, they have engineers out there, and what they do is they monitor the contracts that Blaze does to – or to make sure that they're complying with a particular specification, building it according to what they bid for.

PI: Does the BIA ever do any – any road construction with its own employees?

EW: Yes. That force account crew that I mentioned, yes.

PI: Do you have any idea as – the percentage of the annual budget, how much –

[Transcript, page 80]

EW: – I have no idea –

PI: – of it's spent on direct and how much is contracting?

EW: I don't know.

PI: In talking about when the State takes over road maintenance. Do you have knowledge of that happening? Has that happened in your 25 years there?

EW: Yes, and I want to reiterate: that is not a department that I am involved in, but I've heard mention that this particular road was turned over to the State for their – for their control, to be put on their inventory. And I assume that when that is done, they maintain it. But very few, to my knowledge, have been turned over to the State.

PI: Does – does the BIA ask that the State take over very many?

EW: Not to my knowledge. I inquired about that, and I found out that the State can ask, or the tribe can ask, or the BIA can ask the State to take one over, and they can deny it – or deny their request. But, in my experience, there are very few that I believe have been turned over to the State.

PI: How many – since you aren't involved in this you may not know, so say so – do you know what the procedure is for transferring it to the State?

EW: I think there is an agreement that is reached between the State and the tribal and the BIA.

* * *

[Transcript, Page 84]

DP: But that's an option available to the –

EW: – to the Bureau, yes –

DP: – Bureau. I assume with tribal consultation?

EW: No. That – that's strictly a Bureau function.

DP: Just to clarify an issue: you talked about the lump sum payments. Mr. Irvine asked if you have a lump sum. Does the BIA have a lump sum amount it gets either as designated – appropriated by Congress through the Federal Highway Administration for BIA roads?

EW: To my knowledge, Congress appropriates a lump sum for Interior. Then it's divided up for the different programs. But we do not get it – I know for a fact – as a lump sum, during the year. We have to ask for it on a project-by-project basis.

DP: If you use a – let's say it's $75-$80 million for the BIA, and the BIA has spent all that $80 million, can you go to Federal Highway and say "give us some of your money so that we can spend another $20 million for road construction projects."?

EW: I guess we could, but I don't know if they'd give it to us or if they had it. I don't know.

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(5)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

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QUESTION PRESENTED

Is a state tax on a non-Indian contractor doing business with the United States on an Indian reservation pre-empted when Congress has not expressly provided for such pre-emption and there is no infringement on tribal sovereignty because no tribal funds are used and no tribe is a party to the contract?

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OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at 190 Ariz. 262, 947 P.2d 836 (App. 1997). Petition Appendix ("Pet. App.") 1. The Arizona Supreme Court's order denying review, with one justice voting to grant review, is unreported. Pet. App. 27. The Arizona Tax Court's judgment and minute entry order that the Arizona Court of Appeals reviewed are unreported. Pet. App. 28-29.

STATEMENT OF JURISDICTION

On April 29, 1997, the Arizona Court of Appeals, Division One, entered its judgment. On December 16, 1997, the Arizona Supreme Court denied the petition for review. Pet. App. 27. The Petition for Writ of Certiorari was filed in this Court on March 16, 1998, and was granted on May 18, 1998. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS

The Appendix to the Petition contains pertinent portions of the Arizona Transaction Privilege Tax, A.R.S. §§ 42-1306, 42-1310.16 (Pet. App. 30); the Buy Indian Act, 25 U.S.C. § 47 (Pet. App. 33); the Federal Lands Highway Program, 23 U.S.C. § 204 (Pet. App. 34); and relevant portions of Bureau of Indian Affairs regulations governing road construction, 25 C.F.R. §§ 170.1 through 170.19

(Pet. App. 37), and self-determination contracts, 25 C.F.R. §§ 271.1 through 271.5 (Pet. App. 39).

STATEMENT OF THE CASE

By refusing to apply settled principles that establish state authority to impose non-discriminatory taxes on federal contractors and compounding this fundamental error by misapplying Indian law pre-emption standards to this case, the court of appeals' decision interjects unwarranted confusion into the already complex area of state taxation on Indian reservations. Previous decisions of this Court have focused on the identities of the parties engaged in commercial transactions, recognizing that federal law (1) categorically protects the United States, but not its contractors, from state taxation and (2) categorically protects tribes and tribal members, but not nonmembers who engage in commercial transactions with them, from state taxation unless Congress has expressly or by plain implication pre-empted state law. By relying on amorphous federal interests emanating from statutes and regulations that were never intended to deal with issues of state jurisdiction, the court of appeals' decision undermines this Court's attempts to provide doctrinal clarity to this area of state taxation. This Court should reverse the court of appeals and clarify that federal law does not prohibit state taxes on commercial transactions on Indian reservations between a nonmember, such as the United States, and another nonmember.

A. Facts.

The State of Arizona ("State") maintains a highway system across Arizona, and this system also includes Indian reservations. The State built and maintains the principal highways on the reservations (Pet. App. 19), but the Bureau of Indian Affairs ("BIA"), an agency of the United States, builds and maintains other reservation roads that feed into the State's system. Once built, all BIA roads must remain open to the general public. 23 U.S.C. § 101(a); 25 C.F.R. 170.8(a) ("Free public use is required on roads eligible for construction and maintenance with Federal funds under this part.").

Respondent, Blaze Construction Co., Inc. ("Blaze"), was a contractor that engaged in construction activities within Arizona. Pet. App. 2. The BIA awarded Blaze contracts to construct and repair roads on six Indian reservations located across Arizona.[1] Pet. App. 3. The BIA entered into the contracts pursuant to the Federal Lands Highways Program, which authorizes the Secretary of Transportation to establish a coordinated program for highway construction on a variety of federal lands, including highways through forests and public lands, and roads through Indian reservations. 23 U.S.C. § 204. No tribal funds were used to pay Blaze, although each tribe

[1] The contracts concerned road work on the following reservations: Colorado River (western Arizona, bordering and extending into California), Fort Apache (east-central Arizona), Hopi (northeastern Arizona), Navajo (northeastern Arizona, extending into Utah and New Mexico), Papago (Tohono O'odham) (south-central Arizona, bordering Mexico) and San Carlos (east-central Arizona).

worked with the BIA to plan the routes that the roads would take through the reservations, and Blaze hired reservation residents to work on the road construction. Pet. App. 3-4.

While some of Blaze's projects are in remote locations, many connect to or are near highways that the State maintains, and thus are essentially a part or an extension of the same highway system. JA 14, 16-20. For example, one project is actually an on-reservation extension of Arizona Route 77, providing better access to the off-reservation town of Holbrook and to Interstate 40. JA 16-17. Other projects provide improved access to the Canyon de Chelly National Monument, a popular tourist site, JA 17, and to Ganado High School, a state-funded public school. JA 16.

Blaze transports equipment and personnel over hundreds of miles of state highways to get to its projects scattered throughout Arizona. Pet. App. 4. While Blaze pays vehicle fees and use fuel taxes for its off-reservation use of state highways, these fees and taxes fund road maintenance, not the costs of general government. Ariz. Const. art. IX, § 14. Some of the contracts between Blaze and the BIA specifically provided for preconstruction conferences between Blaze and the BIA in Phoenix, which is located outside any Indian reservation. Pet. App. 4. All of the BIA contracts at issue were awarded and administered by BIA offices located outside any Indian reservation: the Navajo contracts were issued by the Gallup, New Mexico, office and the contracts on all other reservations by the Phoenix office. Superior Court Index of Record ("R") 7, Exhibits K-DD.

The BIA obtains its funding for road projects from the Federal Highway Administration on a project-by-project basis. JA 48-55, 57. While the BIA area offices receive general estimates as to funding available in any given year, nothing in the record indicates that more roads would be built on Arizona Indian reservations if no Arizona tax were imposed.[2]

The State does not claim that it provided direct services to the specific road projects that Blaze performed. Nevertheless, the State provided, and still provides, many services in addition to road maintenance on reservations. For example, the State provides millions of dollars in assistance to public schools serving the reservations. R 7, ¶¶ 13-21. In fiscal year 1991 alone, the Chinle Unified School District on the Navajo Reservation received over $12,000,000 in State payments. R 7, Exhibit F-7. An official study that the Arizona Legislative Council published in November 1995 ("ALC Study") determined that the State spends over $100,000,000 each year on elementary and secondary schools that serve on-reservation Indians. *See* Exhibit 2 to the State's Answering Brief at the Court of Appeals.[3] These education services benefit

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[2] Blaze's only witness on the issue was not directly involved in the financing of projects, JA 54. Accordingly, that witness was not competent to testify as to the consequences of a state tax. He did testify that any unused funding is transferrable to any other BIA office and that the BIA Navajo area office had actually received unused funding from the Phoenix area office, which contracts for road construction for the other five reservations on which Blaze worked. JA 54.

[3] Blaze has objected to consideration of this official report because it was not introduced before the trial court, yet the

Blaze and its tribal member employees by providing for an organized, educated society, as do other on-reservation services such as law enforcement,[4] social services,[5] and child support enforcement.[6]

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report was not actually published until after the dispositive motions were filed. Brief in Opp. at 3, n. 2. The ALC Study was submitted to the Arizona Court of Appeals, which may take judicial notice of official records of state agencies. *State ex rel. Smith v. Bohannan*, 101 Ariz. 520, 421 P.2d 877 (1966); 9 Wigmore, Evidence, § 2568a (Chadbourn rev. 1981). In any event, other documents in the record conclusively establish that the State spends tens of millions of dollars to fund public schools on Indian reservations. R 7, Exhibits F, G, H, I.

[4] *United States v. Patch*, 114 F.3d 131 (9th Cir. 1997) (holding that an Arizona sheriff's deputy patrolling a state highway within a reservation is authorized to stop and pursue law violators, including tribal members), *cert. denied*, 118 S.Ct. 445 (1997); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996) (noting that Arizona law enforcement officers provided services at entertainment events on an Indian reservation); ALC Study at 33 (finding that the Arizona state police have a patrol group assigned almost exclusively to patrol state highways on the Navajo and Hopi reservations and that this group provided assistance to tribal police upon request).

[5] ALC Study at 29 (finding that the Arizona Long Term Care System spent more than $20,000,000 in fiscal year 1993 on services to on-reservation Indian residents); ALC Study at 32 (finding that the minimum cost to the State for Department of Economic Security administration and/or provision of all federal and state programs to eligible on-reservation Indians was $16,143,199 in fiscal year 1993).

[6] *See State v. Zaman*, 190 Ariz. 208, 946 P.2d 459 (1997) (holding that state courts have subject matter jurisdiction over a child-support and paternity action brought by an Arizona county attorney against a non-Indian father on behalf of an Indian mother and child), *cert. denied*, 118 S.Ct. 1167 (1998).

Moreover, Blaze's employees, Indian and non-Indian alike, are protected by Arizona workers' compensation laws and their associated administrative and judicial remedies.[7] If Blaze has any dispute with its employees or subcontractors, the Arizona courts will be the proper forum to resolve the issues.[8] Similarly, if Blaze or one of its non-Indian employees is a victim of a crime committed by a non-Indian, the only criminal law remedy will be prosecution by Arizona officials in Arizona courts.[9] The court of appeals itself recognized that the State furnishes substantial services to Blaze and tribal members. Pet. App. 24.

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[7] State workers' compensation laws and procedures apply to private employers on Indian reservations. 40 U.S.C. § 290; *Begay v. Kerr-McGee*, 682 F.2d 1311 (9th Cir. 1982) (holding that Indians must pursue workers' compensation claim before the Arizona Industrial Commission).

[8] *See Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997) (holding that a state court has jurisdiction over a tort claim against a nonmember for an injury on public highway maintained by state); *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980) (holding that there was no federal court jurisdiction over contract dispute between a tribe and an architectural firm and a building contractor); *but see* 40 U.S.C. § 270b (providing for federal court jurisdiction over claims against the payment bond required of federal contractors).

[9] A state has exclusive jurisdiction over crimes committed by a non-Indian against other non-Indians on the reservation. *United States v. McBratney*, 104 U.S. 621 (1881); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that an Indian tribe's inherent sovereignty does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation).

Pursuant to Arizona Revised Statutes § 42-1310.16 (Pet. App. 30-33), the State assessed a transaction privilege tax on Blaze for its prime contracting work performed within the State, as it would for any other contractor working on or off a reservation. The Arizona transaction privilege tax is imposed as a percentage of a contractor's gross receipts from doing business within the State. The state tax applied to all federal contractors, including ones doing construction work on military bases and other federal property. Arizona Administrative Code § R15-5-604 ("Construction projects performed for the United States Government, state, cities, counties, or any agencies thereof, are taxable.").[10] Blaze protested the assessment.

B. Proceedings Below.

The Arizona Tax Court entered summary judgment for the State, holding that federal law does not pre-empt state taxation of a contractor doing business with the federal government on an Indian reservation. Pet. App. 28. The Arizona Court of Appeals reversed, holding that it was necessary to analyze a state tax on construction contracts with a federal agency for work done on an Indian reservation using the implied pre-emption principles that this Court has applied to the activities of non-

[10] Arizona does not impose its tax on tribal members who are contractors, because the legal incidence of the tax is on the contractor, or on nonmembers who are hired to do work for a tribe, tribal entity or tribal member. *See* Arizona Department of Revenue Transaction Privilege Tax Ruling TPR 95-11, CCH *Arizona State Tax Reporter* ¶ 300-192 (April 21, 1995).

Indians on reservations. Pet. App. 5-9. In doing so, the court of appeals rejected the State's argument that state taxation of federal contracts should be analyzed under the principles that generally apply to the state taxation of federal contractors – namely, that a state tax will be pre-empted only if it is imposed directly on the federal government or if a federal statute expressly pre-empts it. *See United States v. New Mexico*, 455 U.S. 720 (1982).

In applying an implied pre-emption test, the court of appeals found congressional intent to pre-empt the state tax arising out of the Buy Indian Act (25 U.S.C. § 47), which establishes a contracting preference for any Indian (Blaze is owned by a member of an Indian tribe located outside Arizona[11]) (Pet. App. 13, 15-16), and in BIA regulations concerning construction of reservation roads and implementation of the Indian Self-Determination and Education Assistance Act (25 C.F.R. §§ 271.1-271.5) (Pet. App. 12-13, 15-16). The court of appeals found that federal policies that these statutes and regulations reflected were similar to those found pre-emptive in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832

[11] Blaze's ownership by an Indian is not decisive here because this Court has held that a nonmember Indian stands on the same footing as a non-Indian for state tax purposes. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-1 (1980); *see also, Duro v. Reina*, 495 U.S. 676, 686 (1990) ("Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class.") and Blaze's Brief in Opposition at 2 n.1 ("Respondent concedes that for purposes of pre-emption analysis it stands in the same position as a non-Indian.").

(1982). The court of appeals declined to accept the State's argument that in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court upheld a state tax in the face of considerably stronger federal interests and more comprehensive statutes than those applicable to Blaze's road construction contracts with the BIA. The court of appeals purported to distinguish *Cotton Petroleum* by holding that a state can tax nonmember activities on a reservation only when there is a *direct connection* between the taxed activity and state services or regulation. Pet. App. 24. It used this holding to distinguish the numerous Arizona and federal cases that had specifically upheld taxes on non-tribal members or on transactions that did not involve tribes or tribal members. Pet. App. 16-25.

The State filed a petition for review with the Arizona Supreme Court. The court denied the petition, with Justice Martone voting to grant review. Pet. App. 27.

SUMMARY OF ARGUMENT

Immunity from state taxation will be found only when "Congress has acted to grant . . . such immunity, either expressly or by plain implication." *Cotton Petroleum*, 490 U.S. at 175-76. State taxation of federal contractors is well accepted by Congress and the courts. No act of Congress pre-empts a state tax on federal contractors merely because they do business on Indian reservations. Reliance upon implied pre-emption, therefore, is particularly inappropriate where, as here, the federal government is a party to the taxed contracts because the federal

government is unquestionably aware of the taxation and it can unilaterally protect itself from state law.

Moreover, even if the implied pre-emption doctrine were applicable, it would only bar a state tax on federal contractors if the tax clearly and impermissibly interfered with federal or tribal interests. Indirect and insubstantial effects on tribes or the federal government are insufficient to divest states of their fundamental interest in imposing non-discriminatory taxes. State taxes on transactions that involve only non-tribal members are generally valid because they do not directly and substantially affect tribal interests. The court of appeals' interpretation of *Cotton Petroleum* as requiring a direct connection between state services and the nonmember activity being taxed is simply wrong and unworkable. While state services may be a relevant consideration in determining whether a state tax on nonmembers doing business on-reservation *with a tribe or its members* is pre-empted, the nexus between state services and business activities should be immaterial in determining whether a tax on nonmembers doing business with other nonmembers is pre-empted.

Finally, the court of appeals erred in basing its finding of federal pre-emption on the Buy Indian Act and the BIA regulations that implement the Indian Self-Determination Act. These provisions regulate the federal government's conduct in contracting with tribes and others, but they do not demonstrate "that Congress intended to remove all [state-imposed] barriers to profit maximization" with respect to such contracts. *Cotton Petroleum*, 490 U.S. at 180. Given Congress' general acquiescence in state taxation of federal contractors, congressional intent to

establish a different rule for contractors on Indian reservations should not be implied from the amorphous expressions relied upon by the court below. *See Cotton Petroleum*, 490 U.S. at 189 ("Unless and until Congress provides otherwise, each of the two sovereigns has taxing jurisdiction over all of Cotton's leases.").

ARGUMENT

The court of appeals committed the fundamental error of assuming that tribal sovereignty is adversely implicated by a state tax even when no tribe or tribal member is a party to the taxed transaction. This flawed premise caused the court below to find congressional intent to pre-empt state taxes in circumstances where the federal interests are considerably weaker and the federal statutes considerably less explicit than in cases in which this Court has held that there was no intent to pre-empt state law. The court further erred by reading into this Court's decisions a requirement that a state may tax commercial transactions between nonmembers that occur on Indian reservations only if there is a "direct connection" between state services and the taxed activity. Correction of these errors is essential to ensure the predictability in the law required for effective tax administration by eliminating the necessity for states and businesses to guess whether particular transactions are subject to state taxation. In sum, the court of appeals' ruling is contrary to the law as embodied in this Court's decisions, and therefore, should be reversed.

I. FEDERAL CONTRACTORS DOING BUSINESS ON INDIAN RESERVATIONS ARE TAXABLE UNLESS CONGRESS EXPRESSLY PRE-EMPTS THE TAX.

The court of appeals erred in holding that congressional intent to pre-empt state taxes on federal contractors who are doing business on Indian reservations may be implied in statutes that do not expressly provide for such pre-emption. Federal law bars a state tax only if the tax is imposed directly on the federal government or if the language of a federal statute expressly pre-empts the tax. *United States v. New Mexico*, 455 U.S. 720, 733-38 (1982). "[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *Id.* at 734.

United States v. New Mexico illustrates the well-accepted principle that states may tax federal contractors. Accordingly, only an express act of Congress ordinarily pre-empts a state tax imposed on such contractors. *Cf. Cass County v. Leech Band of Chippewa Indians*, 118 S.Ct. 1904 (1998) (slip opinion at 9) ("[O]nce Congress has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it non-taxable."); *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("[Where] federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' ").

The court of appeals disagreed, finding that the implied pre-emption doctrine applicable to cases involving transactions with tribal members also should apply in cases involving federal contractors operating on Indian reservations, primarily because this Court has never stated otherwise. Pet. App. 5-9. The court of appeals failed to recognize, however, that federal contracts are different from any other taxed activity because one of the parties to the contract – the United States – can unilaterally exempt itself and its contractors from any state tax. That unique fact distinguishes this case from this Court's prior cases. The Court's extension of the tax exemption of tribal members to nonmembers doing business on the reservation in previous cases was not based upon any implied congressional intent to protect nonmembers. Rather, it was based upon the recognition that the state taxes were effectively, albeit indirectly, taxes on a tribe or tribal member. *See, e.g., Bracker* (tax on tribal contractor who was reimbursed by tribe for amount of tax) and *Ramah* (tax on contracting services provided to tribal entity with contractor being reimbursed for full amount of tax paid).

This Court's early formulation of the implied pre-emption doctrine in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), explains why it is limited to those who are dealing with tribes. In *McClanahan*, this Court clarified that what distinguishes Indian pre-emption from general pre-emption is that "Indian sovereignty . . . provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. The Court consequently "examine[s] the language of the relevant federal treaties and statutes in

terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Bracker*, 448 U.S. at 144. Accordingly, if no tradition of tribal sovereignty or tribal immunity from state law exists with regard to a particular activity, there are no tribal interests that weigh in favor of determining that Congress intended to pre-empt state taxing jurisdiction. *See Cotton Petroleum*, 490 U.S. at 182 ("There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read."); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("If, however, we do not find such a tradition, . . . our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty."); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1409 (1997) ("In the main, the Court explained, 'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.' ").

The court of appeals relied upon tribal interests in regulating inside a reservation's boundaries as the basis for an assertion that the tax here might implicate tribal sovereignty. Pet. App. 7-8. It is true that this Court in *Bracker* identified "a geographical component to tribal sovereignty," (448 U.S. at 150), but this Court's subsequent holding in *Cotton Petroleum* clearly rejected mere geography as a substantial consideration in the pre-emption analysis. Instead, *Bracker* is plainly more properly understood as holding that the comprehensive statutory scheme at issue there demonstrated Congress's manifest intent to pre-empt that particular state tax.

Moreover, the court of appeals failed to grasp the vital element embodied in this Court's decisions – namely, that the identity of the contracting parties is of central importance in any Indian law analysis and that *federal* sovereignty in not interchangeable with *tribal* sovereignty. *Blaze Construction Co. v. Taxation & Revenue Dep't*, 118 N.M. 647, 884 P.2d 803, 805-6 (1994), *cert. denied*, 514 U.S. 1016 (1995). When a contract involves only the federal government and a nonmember of the tribe, the implied pre-emption doctrine is inapplicable because its essential purpose – protecting tribal interests from unwarranted state-law intrusion – is simply not implicated. Moreover, federal interests do not need the protection of the implied pre-emption doctrine because the federal government can protect itself and its contractors directly, rather than by implication, if Congress deems such protection warranted.

Taxation of federal contractors is a matter peculiarly within the scope of congressional authority because Congress must authorize and fund the underlying projects. "Congress is [therefore] in a position to weigh and accommodate the competing policy concerns and reliance interests [involved]." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700, 1705 (1998). If Congress wishes to pre-empt state taxes on federal contractors who do work on Indian reservations, it can easily do so.[12] Its

[12] *See, e.g.*, 5 U.S.C. § 8909(f) (barring any state tax, fee or other monetary payment with respect to health payments made to a carrier by the United States); 15 U.S.C. § 381 (Pub. L. 86-272) (limiting state power to impose an income tax on interstate commerce); 49 U.S.C. § 11501 (Railroad Revitalization & Regulatory Reform Act) (limiting state taxes that discriminate against rail transportation property); 49 U.S.C. § 40116 (limiting state power to tax air commerce).

failure to do so here leaves in place the general rule that state taxes on federal contractors are permissible unless Congress expressly pre-empts them.

II. A STATE TAX ON NONMEMBER FEDERAL CONTRACTORS IS NOT IMPLIEDLY PRE-EMPTED BECAUSE CONGRESS HAS NOT SHOWN BY PLAIN IMPLICATION ITS INTENT TO BAR A TAX ON SUCH TRANSACTIONS.

Even if pre-emption of a state tax can be implied from federal law, the cloak of tax immunity that the tribes enjoy does not extend to nonmembers or the federal government. This Court's precedents establish that state taxes on commercial transactions between nonmembers on reservations are generally valid, absent a clearer expression of congressional intent to pre-empt state law than exists here. Application of this general rule provides certainty and promotes "the reality that tax administration requires predictability." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-60 (1995). By focusing on an ascertainable and objective fact – the identity of the parties – this rule encourages predictability, discourages litigation, and provides symmetry with this Court's categorical rule that state taxation of Indian tribes and tribal members with respect to on-reservation matters is presumed to be invalid. *See Chickasaw Nation*, 515 U.S. at 457-60. The court of appeals erred by ignoring the controlling importance of the identity of the contracting parties to any implied pre-emption analysis, finding the

extent of services that Arizona provides to be determinative and reading congressional intent to pre-empt state taxation into statutes that are not related to issues of state taxation or jurisdiction.

A. State Taxes on Non-Tribal Members are Generally Valid.

The starting point of any analysis of state or tribal jurisdiction on an Indian reservation must be the identity of the party. This is true in both tax and non-tax cases. *See Strate*, 117 S.Ct. at 1409 (finding that there was no tribal court jurisdiction over a nonmember defendant for a tort on a public highway maintained by state); *Chickasaw Nation*, 515 U.S. at 457-60 (holding a state fuel tax imposed directly on a tribe invalid); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) (finding that a tribal owner of land was subject to property tax but not to excise tax); *Montana v. United States*, 450 U.S. 544 (1981) (finding that there was no tribal jurisdiction over non-Indian on fee land within the reservation); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that there was no tribal criminal jurisdiction over non-Indians).

In tax cases utilizing the implied pre-emption analysis, this Court has repeatedly noted the overriding importance of the parties' identities in such an analysis. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) and *Cotton Petroleum*, this Court upheld state taxes on nonmembers, primarily because the taxes were imposed on nonmembers and not on a tribe. In *Cotton Petroleum* this Court noted that "[i]t is important

to keep in mind that the primary burden of the state tax falls on the non-Indian taxpayers." 490 U.S. at 187 n.18; *see also Department of Taxation & Revenue v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (holding that the Indian trader statutes did not prevent a state from imposing burdens on sales by wholesalers to Indian retailers who in turn sold to non-Indian consumers). While the Court has been willing to look beyond the bare legal incidence of the tax under state law when the tax is directly passed on to a tribe or tribal member, *see Ramah*, *Bracker* and *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), the deciding factor has consistently been whether the tax is actually a tax on Indians.[13]

These decisions reflect this Court's determination that federal statutes will not be given a broad interpretation when their primary effect is to pre-empt a tax on nonmembers. A state's interest in nonmember activities throughout the state will be assumed and accepted absent direct and substantial interference with federal law. Concurrent jurisdiction over nonmembers, based on the shared sovereignty of the states and tribes over nonmembers, allows both entities to tax transactions that do not involve a tribe or tribal members. *Cotton Petroleum*, 490 U.S. at 188-89.

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[13] This Court's consistent sustaining of taxes on nonmembers actually supports a presumption that state taxes on commercial transactions between non-tribal members are valid. *See County of Yakima*; 502 U.S. at 257-58 ("[t]his Court's most recent cases have recognized the rights of States, absent congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands").

Recognition that a state has significant interests in transactions between nonmembers on Indian reservations is consistent with the principle that Indian pre-emption analysis involves a balancing of federal, tribal, and state interests, and that "the traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983). This Court has held that tribal sovereignty over nonmembers is limited. *Montana v. United States*, 450 U.S. 544, 565 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."); *see also South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993), *quoting Montana*, 450 U.S. at 564 ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' ").

Using the limited tribal sovereignty over nonmembers as a "backdrop" for pre-emption analysis compels the conclusion that federal law generally does not pre-empt a state tax on commercial transactions between nonmembers. Thus, the general rule that federal contractors are taxable by the state should be recognized unless Congress provides otherwise "by plain implication." *Cotton Petroleum*, 490 U.S. at 175-6, 189 ("Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over all of Cotton's leases."). Congress has not done so here.

B. The Court of Appeals' Decision Conflicts with This Court's Decision in *Cotton Petroleum* by Requiring a State to Show a Direct Connection Between State Services and the Activities Taxed, Even When the Activities Do Not Involve Any Tribal Members.

The essential underpinning of the court of appeals' implied pre-emption analysis is that there must be a *direct* connection between state services and the specific nonmember activity being taxed to validate the state tax. This novel requirement is not and should not be the law. This Court has considered state services in its implied pre-emption analysis because it recognizes that a state can establish that the services that it provides justify the tax even though the tax may be viewed to some extent as inconsistent with federal and tribal interests. *See Mescalero Apache Tribe*, 462 U.S. at 334 ("State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless* the state can justify the assertion of state authority.") (emphasis added). A state does not, however, need to justify a tax with a showing of corresponding state services when the tax is imposed on a nonmember doing business with the United States because such a tax does not interfere with federal and tribal interests.[14]

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[14] The Ninth Circuit has correctly recognized that the scope of state services is entitled to little weight in determining whether a state tax on transactions between non-members is pre-empted. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 853 (1998) (rejecting the proposition that a tax on transactions between non-Indians

The clear weight of authority is that a state tax on transactions that involve only nonmembers is not preempted even though extensive federal regulation exists and the tax has economic or regulatory effects on a tribe. *See, e.g., Milhelm Attea*, 512 U.S. at 74-75 (holding that the Indian trader statutes do not prevent a state from imposing burdens on sales by wholesalers to Indian retailers who in turn sell to non-Indian consumers); *Cotton Petroleum* (upholding state tax on non-Indian lessee's oil production); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. at 153-59 (upholding state tax on non-member purchasers of tobacco products from tribal retailers); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) ("[R]eservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards."); *Thomas v. Gay*, 169 U.S. 264 (1898) (holding that a territorial legislature may tax non-Indian-owned cattle on Indian reservation).

In *Cotton Petroleum*, this Court upheld state severance taxes on a nonmember lessee's on-reservation production of oil and gas in the face of tribal and federal interests significantly greater than those at stake here. 490 U.S. at 185. The court of appeals misconstrued *Cotton Petroleum* when it found that the decision *required* that there be a

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must be "narrowly tailored" to services provided to the reservation); *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996) ("The Tribe's insistence that there be a direct connection between the state sales tax revenues [from nonmembers] and the services provided to the Tribe is similarly meritless.").

direct connection between the state services and the taxed activities to validate a state tax. In fact, *Cotton Petroleum* specifically rejected the notion that there must be a *quid pro quo* relationship between a taxpayer and the State. *Id.* at 185 n.15. Moreover, this Court's discussion of general services that the State of New Mexico provided to Cotton and the tribe demonstrates that the relevant services were not limited to those that were directly connected to the taxed activity. Indeed, in rejecting Cotton's claim that the state tax was invalid because the amount of tax paid exceeded the value of services provided by the State, this Court held that "the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it." *Id.* at 189. Therefore, a direct connection with the taxed activity is not required.

Moreover, the Court's discussion of services in *Cotton Petroleum* was actually directed at determining whether the "state provides the benefits of an organized and civilized society to all of its citizens, [Indian] and non-Indian alike, and to businesses, including Cotton, extracting oil and gas in the state." *Id.* at 171 n.8. As the Court stated:

> The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good.

Id. at 190 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937)). Nothing in *Cotton Petroleum* supports the conclusion that this "fundamental principle of government" does not apply to Blaze's activities on Indian reservations.

While state services have been discussed as one of many factors relevant to a consideration of the tribal, federal, and state interests at stake, the provision of state services has been important only when the state tax was imposed on someone with whom a tribe or tribal member did business and the economic incidence of the tax was passed on to the tribe or its members. *Cotton Petroleum* demonstrates this in its discussion of the *Ramah* and *Bracker* cases. There, the Court did not discuss state services in the context of analyzing congressional intent as reflected in the relevant federal laws, but only as a counterweight to the recognition that the taxes imposed in *Ramah* and *Bracker* were actually burdens on the tribes. *Id.* at 184-85. In both cases, the taxes were imposed on tribal contractors and were passed on to the tribes. Where no tribe is a party to a transaction, the existence of state services should be a factor of no import because the state has the power to impose the tax unless Congress has plainly legislated to the contrary.

Nonetheless, even if the provision of state services is relevant where the tax is imposed on a transaction between nonmembers, both Blaze and the court of appeals understate the scope of relevant state services by focusing only on direct services, thereby ignoring the State's provision of the "intangible value of citizenship in an organized society." *Id.* at 189. If Blaze's operations are trouble free, state involvement in its activities may

indeed be minimal. If, however, any of its employees are injured on the job and make a workers' compensation claim, it has a dispute with its employees or subcontractors, or it is a victim of a crime committed by a non-Indian, the benefits of the organized society provided by the State of Arizona will be apparent.

Blaze is a nonmember doing business within Arizona. It benefits from the services provided by the State, and there is no requirement that the State prove the validity of its tax by establishing a direct connection between state services and the taxed activities. Such a requirement has never been imposed by this Court and is contrary to the "fundamental principle of government," recognized in *Cotton Petroleum* as applying to nonmembers doing business within Indian reservations, that taxes exist primarily for the common good, not as compensation for services rendered to the taxpayer. The court of appeals' contrary ruling should be reversed.

C. This Case Does Not Involve a Federal Regulatory Scheme That Evidences Congressional Intent to Pre-empt a State Tax on Federal Contractors.

The lower court further erred in finding that federal regulation of on-reservation road construction evidences congressional intent to pre-empt state law. The court of appeals found *Bracker* and *Ramah* controlling on this point, but in doing so relied upon surface similarities with the statutory schemes at issue in those cases. Those statutory schemes are plainly distinguishable from those

at issue here, especially when viewed against the "backdrop" of Indian sovereignty. While tribal sovereignty was a central issue in both *Bracker* and *Ramah* because the state taxes were imposed on tribal contractors who were paid with tribal funds, it is not an issue here because the contractors are not doing business with any tribe and are paid with federal, not tribal, funds.

Bracker involved federal statutes regulating the sale of reservation timber owned by the tribe. *Bracker*, 448 U.S. at 146-47. The BIA was authorized, and required, to manage the timber for the benefit of its owner and was granted power to determine the disposition of the proceeds from timber sales. The state taxes at issue were imposed on a nonmember contractor hired by the tribe to harvest timber in return for a contractually specified fee. *Id.* at 139. The tribe agreed to reimburse its contractor for any tax liability incurred as a result of its on-reservation activities. *Id.* at 140. The Court held that the federal regulatory scheme was "so pervasive as to preclude the additional burdens sought to be imposed in this case." *Id.* at 148. In reaching this holding the Court noted that the federal government was responsible for reviewing and approving the contracts between the tribe and its contractors, and that the economic burden of the asserted taxes would fall on the tribe. *Id.* at 149, 151.

In *Ramah*, the state had closed the only public high school that served the Ramah Navajo children. *Ramah*, 458 U.S. at 834. A tribal organization was formed to operate a local school. *Id.* This organization received federal funds specifically earmarked by Congress for the design and construction of a new school. *Id.* at 835. This Court found that federal law specifically encouraged

Indian-controlled institutions, comprehensive regulations had been developed respecting school construction for schools controlled and operated by tribes, and, as in *Bracker*, the economic burden of the tax fell on the tribe. *Id.* at 840-41.

In both *Bracker* and *Ramah*, this Court found a comprehensive federal regulatory scheme that demonstrated a congressional intent to pre-empt state law because its purpose was to regulate on-reservation dealings with tribes. In both cases the economic burden of the tax was on the tribe and the money to pay any tax would necessarily come directly from tribal treasuries. These facts were essential as a "backdrop" to the Court's decisions. Federal regulation is not controlling in pre-emption analysis unless the purpose of that regulation plainly supports congressional policies to protect tribes and their members from impermissible state taxes. The court of appeals erroneously equated any federal regulation of on-reservation activities with the comprehensive regulatory schemes found to be pre-emptive in *Bracker* and *Ramah*. This conclusion is plainly contrary to the general rule applied by this Court in *United States v. New Mexico* that taxes on federal contractors are not barred even though the tax is ultimately borne by the United States and the contractor's activities are completely controlled by the federal government.

Even more importantly, equating federal regulation with federal pre-emption of state taxation is plainly contrary to this Court's decisions in *Cotton Petroleum* and *Milhelm Attea*. *Cotton Petroleum* involved a challenge to a state severance tax on the production of oil and gas on an Indian reservation. *Cotton Petroleum*, 490 U.S. at 156. The

mineral leases in *Cotton Petroleum* were subject to federal regulation at least as comprehensive as that present in *Bracker* and *Ramah*, yet this Court upheld the state tax. The Court emphasized that the primary burden of the tax was on non-Indians, *id.* at 187 n.18, and that federal regulation was not exclusive because the nonmember taxpayer was subject to some state law. *Id.* at 186. *Bracker* and *Ramah* were distinguished as involving complete abdication or noninvolvement of the state in the on-reservation activities and because the taxes were passed on to the tribes. *Id.*

This Court's decision in *Milhelm Attea* also rejected the argument that comprehensive federal regulation of on-reservation activities inevitably leads to pre-emption of any state tax on those activities. 512 U.S. at 70-78. In *Milhelm Attea* enrolled tribal members purchased cigarettes and resold them to nonmembers. *Id.* at 64-65. The State of New York adopted regulations to require that wholesalers precollect state tax on sales intended for resale to nonmembers. *Id.* The taxpayer challenged the regulations as being pre-empted by the federal Indian Trader Statutes, 25 U.S.C. § 261 *et seq.*, because the regulations imposed actual burdens on sales to tribal members. *Id.* at 67-69. This Court rejected that challenge, noting that "[a]lthough language in *Warren Trading Post* suggests that no state regulation of Indian traders can be valid, our subsequent decisions have 'undermine[d]' that proposition." *Id.* at 71, quoting *Central Machinery Co. v. Arizona State Tax Comm.*, 448 U.S. 160, 172 (1980) (Powell, J., dissenting). The Court found the purpose and effect of state regulation was to impose taxes on nonmembers, and that the state had not sought to control "the kind and

quantity of goods and the prices at which such goods shall be sold to the Indians." *Id.* at 75, quoting 25 U.S.C. § 261. The Court looked beyond the bare existence of comprehensive federal regulation, and found no congressional intent to bar state taxes ultimately borne by nonmembers.

Cotton Petroleum and *Milhelm Attea* illustrate the principle that comprehensive federal regulation of a reservation activity is not enough to pre-empt a tax on nonmembers doing business on an Indian reservation. One of this Court's most recent decisions relating to state taxation on reservations reinforces this point. In *Montana v. Crow Tribe*, 118 S.Ct. 1650, 1652 (1998), this Court described *Cotton Petroleum* as a "pathmarking decision," and stated:

> *Cotton Petroleum* clarified that neither the IMLA, nor any other federal law, categorically pre-empts state mineral severance taxes imposed, without discrimination, on all extraction enterprises in the State, including on reservation operations. "Unless and until Congress provides otherwise, each of the . . . two sovereigns [– State and Tribe –] has taxing jurisdiction over all [on-reservation production]."

Id. at 1660. In this case, the Court should employ the same method of interpreting congressional action and decline to read pre-emption into congressional silence.

Bracker and *Ramah* involved statutory schemes that this Court interpreted as implicitly and unequivocally barring any state taxes imposed on transactions with tribes when the tax will plainly have to be paid out of the contractor's receipts of tribal funds. *Cotton Petroleum* and

Milhelm Attea, on the other hand, involved state taxation of on-reservation transactions where the tax was not directly passed on to the tribe. In all four cases there were economic effects on the tribe and comprehensive federal regulation, but federal pre-emption existed only when the effect of barring the state tax was to protect tribes and their members from direct and substantial effects of state law. There is no federal pre-emption when the primary effect is to protect nonmembers.

This Court's analysis of congressional intent in *Cotton Petroleum* and *Milhelm Attea* demonstrates why the court of appeals erred in its finding of federal pre-emption in the Buy Indian Act and the BIA regulations implementing the Indian Self-Determination Act. These provisions regulate the federal government's conduct in contracting with tribes and others, but they in no way demonstrate "that Congress intended to remove all [state-imposed] barriers to profit maximization." *Cotton Petroleum*, 490 U.S. at 180.

The Buy Indian Act, 25 U.S.C. § 47, merely requires the federal government to prefer vendors who are members of recognized Indian tribes. The court of appeals found that a member of the tribe where the contract was performed, who would not be taxable by the State, would enjoy an advantage over a member of a different tribe, who would be taxable. It found in this fact a basis for concluding that there was congressional intent to pre-empt state law. The statute contains no evidence of pre-emptive intent. Nothing in the Buy Indian Act remotely suggests that Congress intended to change the rule that tribal sovereignty does not protect nonmembers from state laws, even if the nonmember is enrolled in a separate recognized tribe. More broadly, the rule has been

established since 1980 when this Court decided in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. at 160-1, that nonmember Indians are to be treated as non-Indians for state tax purposes, yet Congress has not acted legislatively to mandate a different rule.[15]

The court of appeals' reliance on the regulations implementing the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, is even more misplaced.[16] Most importantly, this Court has rejected the suggestion that the Self-Determination Act has any broad pre-emptive effect on taxes imposed on non-Indians. *Cotton Petroleum*, 490 U.S. at 183 n.14; *Colville*, 447 U.S. at 155. The court of appeals therefore did not rely on the Act itself, but on the BIA regulations adopted under the Act that express "the policy of the Bureau." Pet. App. 13, 40, citing former 25 C.F.R. § 271.4(d) and (e). It is plain that the lower court's analysis, rather than being rooted in congressional intent,

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[15] In contrast, following the ruling in *Duro v. Reina*, 495 U.S. 676 (1990), that tribal courts do not have criminal jurisdiction over nonmember Indians, Congress responded quickly. *See* Pub. L. No. 101-511, 104 Stat. 1856, 1892-93 (1990); Pub. L. No. 102-137; 105 Stat. 646 (1991) (giving tribes such jurisdiction).

[16] Congress originally enacted the Indian Self-Determination Act in 1975. Pub. L. 93-638, Jan. 4, 1975, 88 Stat. 2203. Congress has amended the Act numerous times, most significantly in 1988, 1990 and 1994. Pub. L. 100-472, Oct. 5, 1988, 102 Stat. 2285; Pub. L. 101-644, Nov. 29, 1990, 104 Stat. 4665; Pub. L. 103-413, Oct. 25, 1994, 108 Stat. 4250. None of these amendments is controlling here, and neither the court of appeals nor the Respondent relies upon, or even cites to, the language of the statute itself. Pet. App. 13; Brief in Opp. 11. The time period at issue here is June 1, 1986, to August 31, 1990. Pet App. 2-3.

rests only on a BIA policy unrelated to state taxation. In addition, because no tribe was a party to any of the contracts, the contracts at issue were not even regulated by the Self-Determination Act regulations. Reliance on the Act as an example of a comprehensive federal regulatory scheme governing the taxed activity is therefore plainly erroneous. Moreover, the Court has long been wary of relying solely on the pervasiveness of federal regulations in deciding whether state law should be pre-empted. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716-717 (1985). This is because administrative agencies generally tend to adopt extensive regulations without meaning to divest states of regulatory authority and because it is relatively easy for federal agencies to make clear and unambiguous their intention to pre-empt state law. *Id.*[17]

Blaze's argument concerning self-determination, which the court of appeals accepted, is that imposition of the State tax might affect a tribe's decision whether to assume the federal function of road construction and maintenance. Blaze argues that because tribal contractors are not taxable under Ramah, but federal contractors are taxable, a tribe would actually save money by doing the work itself. Therefore, the argument continues, a tribe would be "penalized" by not undertaking these projects

[17] Similarly, the BIA regulations governing road construction, 25 C.F.R. §§ 170.1 – 170.19, cannot be interpreting as evidencing congressional intent to pre-empt state law because they merely regulate agency procedures and are not based on any statute addressing tribal sovereignty or self-government.

itself because the state's law results in the federal government having to pay more for the project and having less money with which to provide services to the tribe. This argument is unsupported by either the language or policy of the Act, or by any facts; its only support is Respondent's tortured hypothetical. The BIA regulation itself simply provides that "the policy of the Bureau" is not to impose sanctions on Indian tribes with regard to contracting or not contracting. The plain purpose behind this policy is to prevent the BIA itself from coercing any tribe into contracting, or not contracting, with a threat of a reduction in services. No such coercion exists here. It simply cannot be the law that every state law that increases the cost to the federal government of providing a service to a tribe is pre-empted.

Moreover, nothing in the Act implies that Congress intended to prevent a tribe from benefiting from its independent sovereignty to lower one of its costs of providing services – namely, state taxes. Congress has sought to provide funding to contracting tribes that is at least equal to that necessary to provide the level of service previously provided by the federal government. 25 U.S.C. § 450j-1(a)(1), as added Pub. L. 100-472 (1988) ("The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract."). Nevertheless, if a tribe can save money through its own management or because of its sovereignty, it can use the money saved to provide additional services. *See* 25 U.S.C. § 450j-1(a)(3), added by Pub. L.

100-472 (1988), struck by Pub. L. 103-413, § 102(14)(C)(1994) ("Any savings in operation of a self-determination contract shall be utilized to provide additional services or benefits under the contract or be expended in the succeeding fiscal year as provided in section 13a of this title."). At bottom, nothing in this regulatory scheme evinces any clear intent to pre-empt Arizona's tax in this case.

To the extent Congress has expressed any regulatory intent with respect to roads on Indian reservations, its position has been to treat them the same as any other federally funded roads. Thus, the Federal Land Highways Act unambiguously expresses congressional intent to treat federal roads on Indian reservations in the same manner as other federal roads. Congress stated in 23 U.S.C. § 204(a) as follows:

> Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on Federal-Aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title.

Pet. App. 34, added by Pub. L. No. 97-424, 96 Stat. 2097 (1983). At the very least, this statute offsets any implication in other statutes of congressional intent to treat Indian reservation roads different than other federal roads.[18]

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[18] More importantly, 23 U.S.C. § 204 demonstrates congressional intent to apply uniform federal policies to all federal roads, including policies concerning state taxation. Less than a year before Congress enacted the statute, this Court decided *United States v. New Mexico*, which upheld a state's authority to tax federal contractors. Congress was certainly aware that state taxes applied to federal contractors, and there could have been little question that under a uniform program states would tax contractors building federal highways on forest and public lands, and on Indian reservations.

Ironically, the court of appeals read the Buy Indian Act and the Self-Determination regulations in an expansive manner to find an implied congressional intent to pre-empt the state tax, but it read the Federal Land Highways Act very differently. It found that "[b]ecause 23 U.S.C. § 204 makes no mention of state taxation of federal contract proceeds, it does not support the view that Congress intended it to address this state taxation topic." Pet. App. 14-15. The court of appeals' disparate treatment of these statutes and regulations, none of which mentions state taxation, highlights the absence of any solid doctrinal footing to its decision.

* * *

Cotton Petroleum and *Milhelm Attea* show that federal regulation of on-reservation activities cannot be equated with federal pre-emption of state taxation. Given Congress' general acquiescence in the state taxation of federal contractors, congressional intent to establish a different rule for contractors on Indian reservations should not be implied lightly. By reading congressional policies to pre-empt taxation into statutes that are unconnected to issues of state taxation, sovereignty, or jurisdiction, the court of appeals' decision provides little guidance to federal contractors, federal agencies, or the states as to whether

federal law pre-empts state taxes on specific transactions. The decision creates confusion by ignoring the central question – whether tribal interests are affected because the state tax burdens a tribe or tribal member. It replaces the analysis grounded in this inquiry with an unpredictable structure unrelated to congressional intent. Under the decision below, federal pre-emption will hinge on whether a particular contract is issued under the Buy Indian Act or whether the work may be done by a tribe pursuant to a contract with the BIA. There is no evidence that Congress intended any of its legislation governing federal contracts to be read so broadly or to cause such unpredictable results.

While this Court has required some balancing of tribal, federal, and state interests in determining the validity of state taxes imposed on nonmembers doing business on-reservation with tribes or their members, it has never applied the test that the court of appeals devised, which ultimately looks to whether the court thinks that the federal government – and indirectly the tribes – might be better off if there were no state tax. This is contrary to the central holding in *Cotton Petroleum* that a state's sovereign interests in exercising jurisdiction throughout its territory will not be set aside based on the kind of vague and undefined federal and tribal interests relied upon by the court of appeals in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' decision.

Respectfully submitted,

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July 20, 1998

(9)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel. Arizona Department of Revenue,

Petitioner,

vs.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals, Division One

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Is Arizona's taxing scheme invalid as applied to road construction contracts on Indian reservations because the tax impermissibly interferes with an Indian tribe's right to self-government to make decisions regarding its infrastructure on the reservation?

II. Is the imposition of a state transaction privilege (sales) tax on road construction activity for the benefit of Indian tribes and located entirely on Indian reservations pre-empted by federal law when the road construction is financed and regulated by the Bureau of Indian Affairs, the selection of the road construction projects is made by Indian tribes, and the State provides no services or regulatory activities in connection with the activities being taxed?

LIST OF PARTIES AND CORPORATIONS

Petitioner is the State of Arizona. The Arizona Department of Revenue was the governmental agency whose name appeared on all pleadings and briefs in the proceedings below. Respondent Blaze Construction Company, Inc. is a Blackfeet corporation and has no parent companies and no nonwholly owned subsidiaries.

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 to the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States; and with Indian Tribes."

The Appendix to the Petition contains selected portions of Federal statutes for highway construction, 23 U.S.C. § 204 (Pet. App. 34), the Bureau of Indian Affairs (BIA) regulations regarding road construction, 25 C.F.R. §§ 170.1-170.9 (Pet. App. 37-39), and the pre-1996 regulations under the Self-Determination and Education Assistance Act, 25 C.F.R. §§ 271.1-271.5. Blaze Construction includes as an Appendix to this brief the significant statutes and regulations cited herein. Supreme Court Rule 24.1. The statutes include portions of the Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450a, 450h; relevant portions of the "Findings" and "Declaration of Policy" for the Tribal Self-Governance Act of 1994, 108 Stat. 4250, 4270-71 (1994), and relevant portions of § 1115 of the Transportation Equity Act for the 21st Century, 112 Stat. 107 (1998). Blaze also includes in its appendix BIA regulations regarding rights-of-way for road construction projects on reservations, 25 C.F.R. §§ 169.3, 170.5; and the recent regulations promulgated under the Self-Determination Act, 25 C.F.R. §§ 900.3 (excerpts), 900.115 (excerpts), 900.119, 900.124, 900.240, 900.241, 900.244, 900.246, and 900.256.

STATEMENT OF THE CASE

Blaze Construction Company, Inc. is a 100% Indian-owned company that is incorporated under the laws of the Blackfeet Tribe. J.A. 12. Between 1986 and 1990, Blaze Construction entered into nineteen contracts with the BIA to construct rural roads located on remote sections of the Navajo, Hopi, Fort Apache, Colorado River, Papago (Tohono O'odham) and San Carlos Apache Indian reservations in Arizona. *See generally* J.A. 13-21 (description of

various projects).[1] Blaze Construction received $26,038,638.66 in revenue for the construction projects. The Arizona Department of Revenue assessed $1,200,581.54 in transaction privilege taxes on the gross receipts of Blaze Construction for the nineteen construction projects. J.A. 11-12. This case presents the issue of whether state transaction privilege, or similar kinds of taxes, are pre-empted by federal law because they conflict with federal regulations and interfere with tribal self-government.

A. Government-to-Government Relations with Indian Tribes

The Federal Government interacts with Indian tribes as sovereign entities. The United States Congress specifically reaffirmed and validated the sovereignty of Indian tribes this year when it passed the Transportation Equity Act for the 21st Century. *See* Pub. L. 105-178, § 1115(b)(4), 112 Stat. 107, 155 (1998) (amending 23 U.S.C. § 202 by adding subsection (2)(C)(I), which directs Secretary of Interior in promulgating new regulations implementing transportation bill to apply procedures "in a manner that reflects the unique government-to-government relationship between Indian tribes and the United States"); *see also* Pub. L. 103-413 § 202(1), 108 Stat. 4250, 4270-71 (1994) (Congressional finding when enacting Tribal Self-Governance Act of 1994 that "the tribal right of self-governance flows from the inherent sovereignty of Indian tribes and nations"); H.R. Rep. No. 93-1600, 93rd Cong., 2d Sess., (1974), *reprinted in* 1974 U.S.C.C.A.N.

1. Although the record in this case is silent on the issue, Blaze did not include state taxes in its bids for road construction projects that it completed in New Mexico. *See* Petition for Writ of Certiorari at 7, *Blaze Constr. Co. v. Taxation and Revenue Dept.* (No. 94-1233), *cert. denied*, 514 U.S. 1016 (1995). This Court can take judicial notice of the record in other cases that have been before it. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157 (1969) (judicial notice of record of conditions of civil rights march in *Walker v. City of Birmingham*, 388 U.S. 307 (1967)); *Wells v. United States*, 318 U.S. 257, 260 (1943) (judicial notice of prior habeas corpus proceedings) (per curiam); *Boag v. MacDougall*, 454 U.S. 364, 367 (1982) (Rehnquist, J., dissenting) (taking judicial notice of filings in United States District Court in Arizona).

7775, 7780-81 (recognizing tribal sovereignty and power of self-government, and that federal law limits tribal powers, but is not the direct source of tribal power); 25 C.F.R. § 900.3 (statement of Congressional policy in Self-Determination Act regulations).

The Executive Branch also interacts with Indian tribes as sovereign governments. On April 29, 1994, President Clinton issued a memorandum entitled "Government-to-Government Relations with Native American Tribal Governments." 59 Fed. Reg. 22,951 (1994). This memorandum clarifies that federal agencies will "ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes." *Ibid.*; *see also* Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998). The head of each executive department and agency must consult with tribes, to the extent permitted by law, prior to taking actions that affect a tribe and must

> assess the impact of . . . Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, programs, and activities.

59 Fed. Reg. 22,951; *see also* Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (1993) (recognizing the strain the budget places on tribal governments and requiring tribal input on proposed regulations); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (executive agencies required to obtain views of tribal governments before imposing regulatory requirements on them); Proclamation No. 5049, 48 Fed. Reg. 16,227 (1983) (recognizing government-to-government relationship); 25 C.F.R. § 900.3(b)(7) (policy of Secretary to work with tribes on government-to-government basis). These statutes and executive pronouncements are examples of the United States' continuing trust obligation to Indians.

B. Statutory and Regulatory Guidelines for Road Construction Projects on Reservations

The United States carries out its trust obligations in a variety of ways, including the construction of roads on Indian reservations. 23 U.S.C. § 204; 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (statement of Rep. Miller supporting funding for Indian reservation road under Intermodal Surface Transportation Efficiency Act of 1992 and remarking that the Federal Government has a "fiduciary responsibility" to see that the Indians have a safe and modern infrastructure); 25 C.F.R. § 900.3(a)(2). Until 1983, Congress appropriated money for the construction of Indian roads in the budget for the BIA. In 1983, however, Congress merely shifted the reservation roads program into the Federal Lands Highway Program, which is managed by the Secretary of Transportation. 23 U.S.C. § 204. After money is allocated to the Department of Transportation, it is transferred to the Secretary of the Interior. *Ibid.* The BIA Area Office monitors and controls funds during each fiscal year. Federal Highway Administration, Department of Transportation & Bureau of Indian Affairs, Department of Interior, *Indian Reservation Roads Programs Stewardship Plan* 38 (July 1996) (hereinafter "*Stewardship Plan*"). The BIA Division of Transportation allocates contract authority and obligations according to the needs formula. *Ibid.*

Each BIA office has a limited budget for road construction projects. At the time that Blaze was building the roads in this case, the BIA had an annual budget of $20 million.[2] J.A. 32. This money

2. Starting in fiscal year 2000, money for road construction projects on reservations will be allocated among Indian tribes according to a formula established by the Department of Interior. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155 (amending 23 U.S.C. § 202 and adding (2)(A)). Under the funding formula, the Secretary must take into consideration the transportation needs of Indian tribes. *Ibid.* (amending 23 U.S.C. § 202 and adding (2)(C)(I)). Congress also created a new rulemaking committee, which is required to consider the challenges faced by Indian tribes, the cost of road construction in each area, the "geographic isolation on reservations, and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources." *Ibid.* (amending 23 U.S.C. § 202 and adding (2)(C)(ii)).

was not sufficient to meet all of the needs for the design and construction of roads on the reservation. *Ibid.* Eddie Ward said that the roads on the Navajo Reservation, for example, "are in bad shape" and the government does not have enough money to maintain them or upgrade them. J.A. 35. In 1996 the BIA received $26 million per year for road maintenance. *Stewardship Plan* 5. The BIA estimated, however, that it needed $90 million per year to adequately maintain reservation roads. *Ibid.*

Mr. Ward's opinions regarding the condition of roads on the reservations are shared by members of Congress. On June 11, 1991, Senator Pete V. Domenici of New Mexico, in proposing an amendment to the Federal Highway Act to increase funding for the Indian road program said:

> [T]he 20,000 miles of Indian roads in the United States are without a doubt the worst 20,000 miles under any unit of Government's jurisdiction in the United States.
>
> The surveys would indicate that the Indian people are traveling on non-roads for the most part. Very few of them are up to any kind of standard that we would travel on. Yet the Indian people pay gas tax, they have trucks and cars, and all of the other kinds of things that we have. And we seek for them a better life.
>
> In some cases, we say let us have economic development and some prosperity on Indian land for the Indian people. We all admit without roads there would not be any prosperity for any of us, and how can we expect them to have economic prosperity and development when they have hardly any roads to travel on?

* * *

> [T]he needs survey that outlines the inadequacy of this system, rating the conditions of these roads, found that only 11 percent of the paved roads and none of the unpaved roads were in good condition. Conversely, 53 percent of the paved roads and a staggering 90 percent of the unpaved roads were rated as poor.

137 Cong. Rec. S7786-87 (daily ed. June 13, 1991); *see also* 137 Cong. Rec. S7787 (daily ed. June 13, 1991) (Statement of Sen. Conrad that roads on reservations are in "abysmal condition"); 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (Statement of Rep. Miller) ("As chairman of the Committee on Interior and Insular Affairs, I have received countless stories of school buses unable to drive to schools because of substandard roads, and of emergency vehicles unable to reach patients in need of medical treatment because of poor road conditions. These are everyday events on Indian reservations. . . .").

If states are allowed to impose a 5% tax on road construction projects, it means that the Indian tribes will have fewer roads. J.A. 33. Based on a $20 million budget, the Indian tribes receive $1 million less in road construction if the 5% tax is imposed on contractors. J.A. 33. The State provided no facts below, and provides none to this Court, that contradict Mr. Ward's testimony.[3]

3. Arizona contends that Mr. Ward was not competent to provide this testimony. Brief at 5 n.2. Arizona's argument and citation to the record is misplaced. First, at the time of these contracts and when Mr. Ward testified, federal regulations required him to know about and inform Indian tribes about the realities of federal funding. 25 C.F.R. § 271.4(e) (1996). Second, the State waived any arguments to Mr. Ward's testimony by not objecting to it during the hearing itself, in any pleadings filed with the tax court, or in its brief to the Arizona Court of Appeals. J.A. 33 (no objection to testimony during hearing); *see Peretz v. United States*, 501 U.S. 923, 936 (1991) (waiver of objection to magistrate presiding over criminal trial); *Mohave Elec. Cooperative, Inc. v. Byers*, 189 Ariz. 292, 301, 942 P.2d 451, 460 (Ct. App. 1997) (failure to object in summary judgment proceedings). Third, Mr. Ward did not testify that he lacked (Cont'd)

Indian tribes are not mere recipients of federal money. 25 U.S.C. § 450a(b); 25 C.F.R. § 900.115(b) (Self-Determination contracts not typical procurement contract). Each tribal government works with the Secretary of the Interior regarding all Indian reservation road projects proposed for funding. 23 U.S.C. § 204(e); *see also* 25 U.S.C. § 450a(b) (Indian tribes are afforded "meaningful participation . . . in the planning, conduct and administration of [federal] programs and services"); 25 C.F.R. § 900.119 (before spending any funds for a planning, design, construction or renovation project, the Secretary shall consult with any Indian tribe significantly affected and follow tribal preferences to greatest extent possible); *Stewardship Plan* 19, 43 (discussing tribal involvement in planning of projects and all of the activities constituting "transportation planning").

> Projects shall be selected by the Indian tribal government from the transportation improvement program and shall be subject to the approval of the Secretary of the Interior and the Secretary [of Transportation].

(Cont'd)
personal knowledge about the effects of taxation on tribal roads. Rather, he testified that he did not know whether the Phoenix BIA office provided funding for the Navajo reservation:

> PI: Do you know if the Navajos have ever gotten some money from the Phoenix area?
>
> EW: I heard that we had, but I don't get involved in that aspect of it either.
>
> PI: So you just aren't as involved in the financing —
>
> EW: — no —
>
> PI: — part of it —
>
> EW: — I'm not involved in the financing at all.

J.A. 54.

23 U.S.C. § 204(j); *see also* 25 C.F.R. § 170.4a; *Stewardship Plan* 4; J.A. 35.

The BIA does not have absolute authority to set the priorities for road construction projects. 25 C.F.R. §§ 170.4a; 900.119. The BIA can only "recommend" to an Indian tribe the projects having the greatest need. 25 C.F.R. § 170.4a. Each Indian tribe "establish[es] annual priorities for road construction projects. Subject to the approval of the Commissioner, the annual selection of road projects for construction shall be performed by tribes." *Ibid.*; *see also Stewardship Plan* 4. The BIA works with the Indian tribes to establish long-range transportation plans for Indian reservations. *Stewardship Plan* 19. To promote coordination and comprehensive planning for road construction projects, the BIA holds public hearings. *Ibid.* § 170.10. One of the main objectives of a public meeting is to "[i]nsure that road locations and designs are consistent with the reservations' objectives. . . ." *Ibid.* The BIA ultimately approves the location, type and design of road projects on the Federal-Aid Indian Road System. 25 C.F.R. § 170.4.

Eddie Ward from the BIA office in Albuquerque described how the process works at the local level:

> [T]he tribe has a roads committee which sets the priorities. A lot of it has to do with politics, as I mentioned there's — they set up the priorities on a need out there for those roads. Both — they go to the area's chapter houses, school bus routes, probably some schools don't have a paved road going to the schools, so they may make that decision to put it on a priority. And they furnish that priority to the Branch of Roads, and then they make the decision as to the money — whether it's just going to be a grade and drain project from the outset or a grade and drain and paved, but that decision is made in the Branch of Roads.

J.A. 35.

Indian tribes have a first right of refusal to enter into Self-Determination contracts for road construction on reservations. *Stewardship Plan* 29. If an Indian tribe decides to enter into a construction contract itself, the Department of Interior authorizes (or grants) the money to the tribe. 25 U.S.C. § 450h; J.A. 45-46 (testimony of Eddie Ward). A Self-Determination Act contract "is a government-to-government agreement" and is not a typical procurement project. 25 C.F.R. § 900.115(a)-(b). Under the new regulations for Self-Determination Act contracts, the Secretary of the Interior either provides the money as a grant to the tribe, 25 C.F.R. § 900.124, or the Secretary approves a schedule for payments based on progress, need and other considerations.[4] *Ibid.* § 900.132(a). The BIA is forbidden from coercing Indian tribes into making certain decisions regarding road construction projects. It is the express policy of the Federal Government for Self-Determination Act decisions "to permit each Indian tribe to choose the extent of such participation of such tribe in self-governance." Pub. L. 103-413 § 203(2), 108 Stat. 4250, 4271 (1998) (Declaration of Policy of the Tribal Self-Governance Act of 1994); *see also* 25 C.F.R. § 900.3(b)(5) ("tribal decisions to contract or not to contract are equal expressions of self-determination"); Proclamation No. 5049, 48 Fed. Reg. 16,227 (1983) (federal government to eliminate "government intervention" that has "stifled local decisionmaking").

If an Indian tribe decides to accept a grant and contract for road construction projects itself, the tribe must follow Federal

4. The Self-Determination Act regulations also contain detailed requirements as to what an Indian tribe must do if wants to enter into a construction contract, 25 C.F.R. §§ 900.122, 900.125-.126; methods for resolving disputes, § 900.123; what must be contained in a tribal budget, § 900.127; funding by the Secretary, § 900.128; methods for determining a fair price, § 900.129; and the role of the Indian tribe and the Secretary during all phases of construction. *Ibid.* §§ 900.130-.131. It should also be pointed out that construction projects are treated differently than other contracts that an Indian tribe can enter into under the Self-Determination Act regulations. *See generally ibid.* §§ 900.7-900.33 (regulations for contract proposals, and review and approval of contract proposals).

Highway Administration standards for roads. J.A. 46-47. The only difference between the two contracts is "whose name is on the contract." J.A. 47. In this case, the State of Arizona concedes that if there was a construction contract between an Indian tribe and Blaze Construction, it was not entitled to tax Blaze. Exhibit D to Appellant's Opening Brief at 14-15 (discussing removal of assessments for contracts between Blaze and tribes); R. 7, Exh. B, at 1 (decision of Arizona Department of Revenue hearing officer noting that Arizona "agrees that receipts from . . . projects ["undertaken for tribes or tribal entities"] are not subject to the Arizona Privilege Tax"); Arizona Transaction Privilege Tax Ruling 95-11 at 3, Ariz. St. Tax Rep. (CCH) ¶ 300-192 (gross proceeds from construction projects on Indian reservations not subject imposition of privilege tax if "[t]he activity is performed for the tribe or a tribal entity").

The Self-Determination Act regulations also make provisions for two scenarios in which the Secretary has to resume responsibility for the contract. An Indian tribe (or tribal organization) may retrocede the contract, i.e., return it to the Secretary, for any reason before the expiration of the term of the contract. 25 C.F.R. §§ 900.240-.241. In some circumstances, it may be necessary for the Secretary to reassume or rescind the construction contract, either in whole or in part. *Ibid.* §§ 900.246-.247. In the event of a retrocession or reassumption of the contract, the Secretary is obligated to provide at least the same level of funding. *Ibid.* §§ 900.244 (retrocession), 900.256 (reassumption).[5]

In many road construction projects, Indian tribes provide value to a project, even if the BIA enters into contracts with contractors such as Blaze. It may be necessary for an Indian tribe to grant of a

5. While the United States has discussed the new regulations in its brief, Brief for United States as Amicus Curiae in Support of Petitioner 5, 20, it does not take a position on whether a state has the right to tax a construction project if the contract was initially awarded to an Indian tribe, but later retroceded or reassumed to the Secretary. Blaze Construction discusses the implications of the new regulations *infra* at 32-33.

right-of-way to the BIA for the construction of a road. J.A. at 36; *see also* 25 C.F.R. §§ 169.3, 170.5. When the tribe grants a right-of-way to the BIA, it is providing something of value, even though the BIA does not have to compensate the tribe for the right-of-way. J.A. 36. In some cases, Indian tribes contribute other resources for projects such as water and base materials. *See* Petition for Writ of Certiorari at 7, *Blaze Constr. Co. v. Taxation and Revenue Dept.* (No. 94-1233) (New Mexico tribes contributed water and base materials), *cert. denied*, 514 U.S. 1016 (1995).

C. Nature of the Construction Projects at Issue

The roads built by Blaze Construction serve extremely remote locations located on Indian reservations, and provide access to Indian schools, homes and local government centers. *See generally* J.A. 13-21. The remote nature of many of these roads, and their importance to the Indians living on the reservations, is shown by a few descriptive examples of the projects.

The "Blue Gap Road Project" involved paving seven miles of road on BIA/Navajo Route 29, as well as pavement of a Chapter House parking lot. J.A. 14-15 (No. 12). The "Blue Gap" project improved access to the Chapter House and to scattered Indian housing in the area. J.A. 15. The road serves as a school bus route for the children. *Ibid.* In the "Blue Gap" area, there are no buildings other than the Chapter House and scattered houses, and it "is located at its closest at least 105 miles by road from the Reservation border. . . ." *Ibid.* Other road construction projects on the Navajo Reservation were forty-four, sixty, and eighty miles respectively from the reservation border, and they improved access to homes Chapter Houses and schools. J.A. 15-16 (Nos. 13-14, 16). The Red Valley Road project was in such a remote region of the Navajo Reservation that to get to the closest point in Arizona not within the Reservation, one had to travel across unimproved roads[6] via

6. For example, Indian 43 is a highway on the Hopi Reservation. A reporter from the Arizona Republic newspaper described Indian 43 from the Hopi Cultural Center on the Second Mesa to the Navajo Reservation as 20 miles of "rutted, (Cont'd)

U.S. Route 666 to Gallup, New Mexico and then back to Sanders, Arizona. J.A. 17 (No. 18).

Blaze's construction projects on the other reservations were similar in character to those on the Navajo Reservation. Blaze provided grading, drainage and pavement for BIA/Hopi Routes 17, 503, and 508, and pavement of the parking lot at the Hopi Tribal Government Center. J.A. 18 (No. 20). This project improved access to housing on the Hopi Reservation[7] and to the Tribal Government Center. *Ibid.* Blaze constructed roads on the Parker Colorado River Roads Project to allow farmers to move equipment between irrigated fields. J.A. 18-19 (No. 22). Blaze built roads on the Papago and San Carlos Indian Reservations to provide better access to scattered Indian housing. J.A. 19-20 (Nos. 24-25, 27). Eddie Ward, the BIA official in Albuquerque who administered these contracts, testified that the areas of the reservations in which Blaze built roads are used almost exclusively by Native Americans residing on their respective reservations. J.A. 41.

D. Arizona's "Involvement" in the Road Projects

Blaze Construction does not own or maintain any offices in Arizona, and holds no contractor's license from Arizona. J.A. 13 (Nos. 3-4). The BIA does not require Blaze to be licensed by Arizona as a prerequisite to being awarded a road construction project. J.A. 13 (No. 4). Blaze Construction only used Federal and State roads to transport equipment from reservation to reservation. J.A. 26-27. Blaze paid fees relating to its use of the Arizona highways during the period of the Assessment, including

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corrugated" road. Richard Nilsen, *Geologic Hub, Cultural Nexus: On Black Mesa, Life on the Rez Comes into Focus*, Ariz. Rep. June 28, 1998, at T6. The road from Second Mesa to Black Mesa is about seventy-five miles long, but 37 of those miles are "dusty gravel." *Ibid.*

7. "The Hopi live in concentrated villages and the out-country is nearly uninhabited." Richard Nilsen, *Geologic Hub, Cultural Nexus: On Black Mesa, Life on the Rez Comes into Focus*, Ariz. Rep. June 28, 1998, at T6.

the purchase and maintenance of its Arizona motor vehicle license. J.A. 21 (No. 30). Blaze was present in Arizona solely because of its construction activities on Indian reservations.

Arizona admits that it did not provide "direct services to the specific road projects that Blaze performed." Brief for Petitioner 5. More specifically, the State stipulated that "[o]n the projects under consideration, Blaze was not provided any specific services by Arizona, except Blaze's use of State roads to transport equipment from reservation to reservation." J.A. 21 (No. 29).[8] The State of Arizona takes almost no responsibility for reservation roads after the reservation boundaries. J.A. 38.[9] Arizona does maintain some main, arterial roads that pass through Indian reservations, but these roads are not at issue in this case. J.A. 39. Eddie Wood testified that in the twenty-five years he has been visiting the reservations in Arizona, the State has not built any new roads on a reservation. *Ibid.* In fact, Arizona stipulated that it provided no maintenance

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8. This stipulated fact controls this lawsuit, not Arizona's belated arguments that it provided a worker's compensation scheme in the event of an industrial accident. Brief at 7. Arizona does not voluntarily provide a worker's compensation scheme. Rather, Congress imposed the state worker's compensation scheme on contractors. 40 U.S.C. § 290. Indeed, the State worker's compensation scheme is an insurance-based service for which businesses pay premiums. There is no evidence in the record that Blaze did not acquire and pay worker's compensation insurance.

9. The printed copy of the Joint Appendix contains a clerical error. The Joint Appendix omitted a question and incorrectly attributes the testimony of Eddie Ward to "DP," who is Attorney Daniel Press. The Joint Appendix omitted the following question:

> DP: To your knowledge, does — does the State provide any services in the way of roads or houses to the relocatees?

App. D to Appellant's Opening Brief, at 49. Because of the clerical error, the first three words of Mr. Ward's answer are incorrectly quoted in the joint appendix. In the actual transcript, Mr. Ward's answer starts as follows: "To my knowledge. . . ." *Ibid.* However, the remaining portions of Mr. Ward's answer in the joint appendix are accurate.

services related to any road at issue. J.A. 21 (No. 33); *see also* J.A. 40; App. B-C to Appellant's Opening Brief (in response to subpoena for maintenance records, the Arizona Department of Transportation said that the roads were "not State highways and are not maintained or serviced by the State of Arizona"); 25 C.F.R. § 170.6 (tribal roads maintained by Tribe or Commission of Indian Affairs). Thus, in this case, Arizona played no role in the planning, permitting or development of the road projects. J.A. 21 (No. 31). The State played no role in the formation of the contracts between Blaze and the BIA. *Ibid.* Arizona provided no planning, engineering, construction, inspection or employment services related to the projects. J.A. 21 (No. 32). Tribal employment groups, not the State of Arizona, provided employment services to Blaze.[10]

E. State Services not Related to Construction Activity

At the tax court level, Arizona relied on educational funds and Blaze's use of state highways to support its purported right to tax Blaze. The State referenced money it spent on education. R. 7 at 4-6 (Statements of Fact 13-21). Under the Johnson-O'Malley Act, 25 U.S.C. §§ 452-57, the Secretary of the Interior enters into contracts with states to educate Indian children. Federal law allows state schools to apply for grants to provide funding for the education of Indians. 20 U.S.C. § 7814(c)(2)(B). The State's own study reported that in fiscal year 1993 Arizona received $84,261,241 in federal money for educating Indian children. *See* Arizona Legislative Council ("ALC") Study at 33 (Exhibit B to State's Answering Brief); *see generally* 20 U.S.C. §§ 7701-10 (describing methodology for calculating Federal Impact Aid, payment of aid to local schools and federal requirement that local school boards

10. If Blaze had a legal dispute with a reservation Indian regarding employment issues, it would have to sue in tribal court. *See generally Montana v. United States*, 450 U.S. 565-66 (1980) (tribe can exercise civil authority over non-members when a consensual relationship with a tribal member) . If the employee had a dispute with Blaze regarding his or her wages, the local federal court, and not state court, would be the forum for such a dispute. 40 U.S.C. § 470b(a).

adopt policies to ensure adequate consultation of Indian parents and involvement of Indian children in school activities). In it brief, Arizona now refers to the funds it spent in the Chinle District. Brief of Petitioner 5. The State failed to inform the Court about the money that this district received in Federal aid. *See, e.g., Arizona Dept. of Revenue v. M. Greenberg Constr.*, 182 Ariz. 397, 399, 897 P.2d 699, 701 (Ct. App. 1995) (in 1987-88, the Chinle District received 48.4% of its money from Federal Impact Aid).

In the courts below, the State also relied on the fact that some state highways pass through Indian Country.[11] R. 7 at 3-4. A state highway exists on an Indian reservation only because an Indian tribe granted a right of way to the federal government, which in turn, granted a right of way to the State. J.A. 36; 25 U.S.C. §§ 323-38; 25 C.F.R. §§ 169.3(a) (grant of right of way to BIA), 170.5(b) (BIA grant of right of way to states). Arizona has no inherent, sovereign right to build or maintain state highways on Indian reservations because it was admitted into the Union under the condition that it would not make any claim over property within the boundary of an Indian reservation. Act of June 20, 1910, 36 Stat. 557, 569; Ariz. Const., art. XX, ¶ 4 (constitutional provision incorporating Congressional limitation).

If Blaze needed to call the police, it relied on the tribal police. J.A. 26 (testimony of Paul Wood). Arizona does not present evidence to rebut the testimony of Mr. Wood.[12] The record does

11. In response to statements 13-20, Blaze asked the trial court for additional time to develop discovery on the source of the educational funds provided to Arizona, the amount of money the State received from the Federal Government, and the opportunity to depose the affiants. App. A to Appellant's Opening Brief at 1-2.

12. Arizona also mentions in its statement of the case the subject of criminal jurisdiction over non-Indians. Arizona's criminal jurisdiction in this case would be very negligible. First, the people who used the roads are almost exclusively Indians who reside on the reservation. J.A. 41. Second, 85% of the people who worked on the project were Indians. J.A. 22 (No. 34). Consequently, federal or tribal courts are most likely to have jurisdiction over any crimes and lesser

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not contain any evidence that Arizona provided law enforcement officers for police protection or to assist in traffic control during the construction of the roads. J.A. 21 (No. 33). In fact, Arizona has already admitted that it "provides no . . . regular police services related to any road at issue." J.A. 21 (No. 33). There are no facts in the record showing the expenditure of state or local funds for law enforcement services on strictly tribal roads such as the ones at issue. Moreover, there is no evidence of an agreement between an Indian tribe and a state or county government to provide law enforcement services on the roads built by Blaze. *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1235 (CA9 1996) ("Police protection at the entertainment events is provided through the non-Indian lessees by state and county police officers specifically invited to work in cooperation with the BIA Law Enforcement Services.").

Arizona refers to social services and child support enforcement justify its involvement on Indian reservations. Brief for Petitioner 6 & nn. 5-6. This is another instance of a factual claim that Arizona did not make to the Arizona Board of Tax Appeals, the Arizona Tax Court, the court of appeals or the Arizona Supreme Court. There is no evidence that State social services or child support enforcement matters involved Blaze or any of its employees on these construction projects. The Federal Government is initially responsible for providing long-term care or social services to Indians. Arizona provides these services because it has a contract

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included offenses. *See* 18 U.S.C. § 661 (federal jurisdiction for theft of personal property over $1,000 and written instruments); 18 U.S.C. § 1152 (tribal jurisdiction over crimes committed by members of the tribe); 18 U.S.C. § 1153(a) (federal jurisdiction for murder, manslaughter, kidnaping, maiming, all types of assault, arson, burglary and robbery); *United States v. Walkingeagle*, 974 F.2d 551 (CA 4 1992) (federal jurisdiction over lesser included offenses), *cert. denied*, 507 U.S. 1019 (1993). Finally, this is not a factual assertion that Arizona raised below. If it had, Blaze would have been able to develop facts showing the extent, if any, of State or county prosecutions of crimes on Indian reservations. Blaze believes that such discovery would have shown negligible State interest in crimes that take place on reservations.

with the United States. 25 U.S.C. § 452 (authorizing Secretary of Interior to enter into contracts to provide medical attention and social services to Indians). There are several social services that either Arizona provides to its citizens, but does not provide to Indians. ALC Study at 24 (listing nine Department of Economic Security programs for which there is either no cost to the State or no services provided to Indians). For three other programs, the State only pays for administrative costs for overseeing federal programs. *Ibid.*

F. Proceedings Below

The Arizona Board of Tax Appeals ruled that the State "failed to identify any valid interest it has in Appellant's construction activities." J.A. 9. The Board of Tax Appeals issued a unanimous decision on July 18, 1994 and held that the "competing federal, state and tribal interest at stake in this case compel preemption of Arizona's transaction privilege tax." *Ibid.* The State of Arizona appealed the decision of the tax board by filing a complaint with the Tax Court, which is a subdivision of the Maricopa County Superior Court. Rule 1, Rules of Practice for the Arizona Tax Court. The tax court ruled on cross-motions for summary judgment, held that *Department of Revenue v. Hane Construction Co.*, 115 Ariz. 243, 564 P.2d 932 (Ariz. Ct. App. 1977), was dispositive and overruled the decision by the Board of Tax Appeals. Pet. App. 29.

Blaze Construction appealed the judgment to the Arizona Court of Appeals. The appellate court overruled *Hane Construction* because its was not premised on the implied pre-emption analysis mandated by this Court. Pet. App. 11, 25-26. Rather than blind application of *United States v. New Mexico*, 455 U.S. 720 (1982), the Arizona Court of Appeals concluded that pre-emption analysis was appropriate because the decision of this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), is not limited to cases in which there is a contract with an Indian tribe. Pet. App. 7-9. The court of appeals concluded that the various federal statutes governing respondent's construction projects constituted a comprehensive federal

regulatory scheme. Pet. App. 15-16, 24. The court also held that petitioner failed to establish any regulatory interest in the road construction projects and cited the reasoning of this Court in *White Mountain* and *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). *See generally* Pet. App.17-18. The appellate court further noted that in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court distinguished its conclusions in *White Mountain Apache Tribe* and *Ramah* because the record before it contained evidence of state regulation of oil wells. Pet. App. 17-18. The Arizona Court of Appeals concluded that Arizona's transaction privilege tax was pre-empted by federal law. The Arizona Supreme Court denied Arizona's petition for review. Pet. App. 27.

SUMMARY OF ARGUMENT

This is a case of first impression for road construction contracts on Indian reservations. The Court must decide if a construction contract between the BIA and a contractor is governed by *United States v. New Mexico*, 455 U.S. 720 (1982), or if state taxation of the contractor is prohibited because it infringes on the right to tribal self-governance, and is pre-empted by Federal law. Previously, the Court has discussed the tribal decisions, in general, and whether the Indian Self-Determination Act pre-empted the application of state taxes. Those cases did not involve decisions under the Self-Determination Act itself. The Court must now decide whether tribal decisions under Federal self-determination statutes and regulations pre-empt the application of state law.

United States v. New Mexico involved a clash between Federal and state authority. The analytical principles that govern disputes purely between the Federal and state governments do not apply to cases in which a state tax infringes on the way in which Indian tribes decide public policy for their members. When there are disputes between states, the Federal Government and tribal government, the Court should apply the Indian pre-emption analysis, just as it employs a multi-factored pre-emption test to determine if state taxes infringe on foreign commerce.

In the instant case, Arizona's tax infringes on the tribal right of self-government and it is pre-empted by federal law. The tax infringes on tribal self-government because tribes always have retained the authority to make their own laws (policy decisions) and be governed by them. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Williams v. Lee*, 358 U.S. 217, 220 (1959). Congress and the President have plainly said that the Federal Government does not have the right to interfere or coerce Indian tribes when making decisions on whether to contract or not contract under the Self-Determination Act. Arizona's tax forces tribes into making Self-Determination Act contracts if it wants to maximize the miles of roads built.

The State's tax is pre-empted because of the comprehensive federal regulations of Self-Determination Act decisions and road construction contracts. Congress and the BIA regulate how money is budgeted to regions and Indian tribes, who sets priorities for road construction projects, the extent of federal and tribal involvement in planning, administration and construction, and whether Indian tribes can take over the projects. Federal law also governs when the BIA can take back the contract. Arizona, on the other hand, has no interest in reservation road construction activities other than taxing them.

ARGUMENT

I. *UNITED STATES v. NEW MEXICO* SHOULD NOT APPLY TO CONTRACTS FOR INDIAN RESERVATION ROADS.

The admonishment of Justice Frankfurter bears repeating in the instant case:

> The necessity for judicial accommodation between the intersecting interests of the States' power to tax and the concerns of the Nation in carrying on its government presents problems solutions for which cannot be sought by a formula assuring a bright, straight line of decisions.

City of Detroit v. Murray Corp., 355 U.S. 489, 496 (1958) (Frankfurter, J., concurring).[13] The State of Arizona and *amici* in support of petitioner fail to heed this advice, however, and blindly argue that *United States v. New Mexico*, 455 U.S. 720 (1982), applies because Blaze had a contract with the BIA. According to Arizona and its supporters, the rule set forth in *United States v. New Mexico* provides a "bright-line" rule to apply in all cases, including those involving construction projects on Indian reservations that are entered into ***after*** Indian tribes make several policy decisions.

United States v. New Mexico and its predecessors such as *James v. Dravco Contracting, Inc.*, 302 U.S. 134 (1937), are premised on the principle that the Supremacy Clause of the Constitution does not forbid state taxation of a Federal contractor in a typical government construction project. *See, e.g., United States v. New Mexico*, 455 U.S. at 733; *Graves v. New York*, 306 U.S. 466, 478 (1939). *United States v. New Mexico* would control here if this were a case in which Blaze just had a contract with the Federal Government for a typical construction project. It did not. Blaze Construction had a contract because six Indian tribes had previously made public policy decisions regarding road construction for the members of their tribes.

A. Indian Pre-Emption Analysis Applies to Taxes that Affect Tribal Decisions about Governmental Policy

The theoretical basis for Justice Frankfurter's concurring opinions in taxation cases was "our federalism." *United States v. New Mexico*, 455 U.S. at 731 (quoting *Graves*, 306 U.S. at 490 (Frankfurter, J., concurring)). Under our federal system, a state must avoid situations in which its taxes interfere with the operation of the federal government. *Graves*, 306 U.S. at 488 (Frankfurter, J., concurring). *Dravco Contracting* and *United States v. New Mexico* cases are judicial resolutions of the clash of federal and state sovereigns. *United States v. New Mexico*, 455 U.S. at 735 (citing *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 430

13. In *United States v. New Mexico*, this Court cited with approval Justice Frankfurter's concurring opinion. 455 U.S. at 735-36.

(1819), regarding clash of two sovereigns). The teaching of *United States v. New Mexico* is that when there is a two-sovereign dispute, the Supremacy Clause does not prohibit states from imposing taxes on a federal contractor. A contractor is only immune from taxation if Congress grants immunity. 455 U.S. at 737-38.

The important distinction between this case and *United States v. New Mexico* is the presence of policy decisions by a third sovereign, Indian tribes, which control decisions made by the United States. Indian tribes have a unique status under our Constitution. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Indian tribes have inherent sovereignty. Pub. L. 103-413, 108 Stat. 4270-71.

This Court has also acknowledged that the presence of Indian tribes involves the interests of three, and not just two, sovereigns:

> The principle of Tribal self-government, grounded in notions of inherent sovereignty and in Congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government on the one hand, and those of the State, on the other.

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 156 (1980).

This Court has recognized the analytical difference between federal and state conflicts under the Constitution, and those involving relations with Indian tribes. *Cotton Petroleum Corp. v. Bureau of Revenue*, 490 U.S. 163, 192 (1989). In addressing Cotton Petroleum's interstate commerce argument, the Court said that the Interstate Commerce Clause "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce clause." *Ibid.* Interstate Commerce issues are like *United States v. New Mexico* cases because both involve a clash of federal and state authority under the Constitution. When a case involves the fundamental interests of Indian tribes to self-governance,

however, the dichotomy of federal versus state authority does not transfer because "the central function of the Indian Commerce Clause is to provide Congress with plenary authority to legislate in the field of Indian affairs. . ." *Ibid.*

The analytical approach advanced by Arizona and *amici* fails because it does not recognize the additional federalism and constitutional concerns that exist when Indian tribes are making political decisions. In fact, Arizona and *amici* completely avoid the tribal self-government issue or only pay it lip service. The Arizona Court of Appeals recognized the unique status and the political tensions involved when it concluded that *United States v. New Mexico* was not dispositive of this case. Pet. App. 9 (disagreeing with decision by New Mexico Supreme Court and stating the decision by the New Mexico court "overlooks the focus of Indian law pre-emption analysis on the occurrence of non-Indian activities on an Indian reservation and the consequent potential that state taxation of those activities will conflict with federal or tribal interests").

Rather than relying on precedents dealing with federal-state relations, it is more appropriate in this case to apply precedents in which the Court has addressed state taxes that affect the Federal Government's interactions with other sovereigns.[14] States have tried to impose non-discriminatory taxes on businesses involved in foreign commerce and this Court has invalidated those taxes because it infringes on the Federal Government's authority to engage in commerce with a sovereign nation. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The Court does not just "rubber stamp" the state tax because it is non-discriminatory

14. In *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1, 16-19 (1831), the Court recognized that Indian tribes as separate sovereigns, but not "foreign states" under the Constitution. Congress, the constitutional institution with plenary power in this area, recognizes that Indian tribes are sovereign governments that it interacts with on a government-to-government basis. *See, e.g.*, Pub. L. 103-413 § 202(1), 108 Stat. at 4270-71 (Congressional finding that "the tribal right of self-governance flows from the inherent sovereignty of Indian tribes and nations").

and applies to a private party. The Court carefully examines six factors to determine if the tax offends the Federal Government's dealings with a third sovereign.[15] The factors from the Foreign Commerce Clause cases that are analogous to Indian pre-emption matters are whether the state taxes are fairly related to services provided by the state and whether the state tax impairs federal uniformity in an area in which federal uniformity is essential. *Barclays Bank*, 512 U.S. 320; *Container Corp.*, 463 U.S. at 186; *Japan Line*, 441 U.S. at 448. A state tax violates the "one voice" standard if it implicates a foreign policy issue that must be left to the Federal Government or violates a clear federal directive.[16]

15. In foreign commerce clause cases the Supreme Court uses the four factors from interstate commerce clause disputes, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and employs two additional criteria to determine whether the state tax is constitutional. The six factors are: (1) Does the activity taxed have a "substantial nexus" with the taxing state? (2) Is the tax fairly apportioned? (3) Does the tax discriminate against interstate commerce? (4) Is the tax "fairly related to the services provided by the State?" (5) Does the tax create an "enhanced risk of multiple taxation?" (6) Does the state tax impair federal uniformity in an area in which federal uniformity is essential? *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-47 (1979); *see also Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 316-17 (1994); *Container Corp. of Am. v. Franchise Tax Board*, 463 U.S. 159, 185-86 (1983); *Complete Auto Transit*, 430 U.S. at 279.

16. There also is a need to speak to Indian tribes with "one voice," particularly under the new transportation bill. The Navajo Reservation is located in Arizona, New Mexico and Utah. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 169 (1973). Under the new transportation bill, the Navajos will receive a set amount of money for its road construction needs. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155. The Navajo leadership will have to determine how to allocate those resources in each state in which it is located. Further complicating this political task is the imposition of different levels of state taxes for construction projects. Ariz. Rev. Stat. Ann. § 42-1317(A)(1) (tax rate of 5%); N.M. Stat. Ann. § 7-9-4 (1998) (5% tax rate); Utah Code Ann. § 58-8-104(1) (1996) (gross receipts tax of 0% up to $10 million and .8613% from $10 million to $500 million). If the Navajo tribe enters into the contract itself, these taxes do not apply. If, however, tribe decides to allow the BIA to contract, it has to consider the application of varying rates of taxation, which complicates the sovereign decision on which roads within the reservation should be built, updated or repaired.

Container Corp., 463 U.S. at 194. Whether a state tax implicates foreign policy matters is a species of pre-emption analysis. *Ibid.*

The Court applies pre-emption analysis for foreign commerce challenges to state taxes. *Japan Line*, 441 U.S. at 446-47. Like foreign commerce matters, the Constitution grants to Congress the exclusive authority to regulate affairs with Indian tribes. Art. I, § 8, cl. 3; *Ramah Navajo School Bd. v. Department of Revenue*, 458 U.S. 832, 837 (1982) (Federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause). When a case involves a clash between the exercise of state authority and Indian sovereignty, the Court does not employ "mechanical or absolute" concepts. *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73, (1994). Instead, the Court utilizes the balancing approach set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *Milhelm, Attea*, 512 U.S. at 73; *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (if legal incidence of tax falls on non-Indian for activities on reservation, Court "balance[s] . . . the federal, state and tribal interests" to see if state may impose its tax). There is no analytical reason to reject pre-emption analysis for state taxes that affect the government-to-government relationship between the Federal and tribal governments under the Indian Commerce Clause, and the decision-making process of Indian tribes about reservation infrastructure. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 n.14 (1980) ("For purposes of federal preemption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs."); *cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76 (1989) (discussing intergovernmental tax immunity, but then adding that the ultimate "question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication"). The Court's multi-faceted test is required to resolve federal, tribal and state disputes in cases involving contractors. *See Ramah Navajo*, *supra*; *Japan Line*, *supra*.

B. *Ramah Navajo* Rejected Arizona's Analytical Approach for Cases Involving Tribal Sovereignty

The State's analytical framework has already been considered and rejected by the Court in *Ramah Navajo*. In that case, New Mexico argued that the "legal incidence" of its gross receipts tax was on the contractor and the case should be controlled by *Dravco*. *See* Brief of the State of New Mexico, *Ramah Navajo School Bd. v. Department of Revenue* at 13-14, 458 U.S. 832 (1982) (No. 80-2162). New Mexico also pointed out that the money for the project came from the Federal Government and would not hinder any value generated by the Tribe. *Ibid.* at 16-17. The Court rejected the simplistic "legal incidence" analysis in *Ramah Navajo* and should do so in this case as well.

The Court met head on New Mexico's legal incidence argument. 458 U.S. at 844 n.8. The Court said that the legal incidence test is significant in some situations such as *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). *Ramah*, 458 U.S. at 844 n.8. Even though the legal incidence of New Mexico's tax was on a New Mexico contractor that did construction work other than that on Indian reservations, the Court refused to allow New Mexico to impose additional burdens on the significant Federal interest in fostering Indian-run educational facilities. *Ibid.*

The position of Arizona, *amici* States, and *amici* National Conference of State Legislatures, *et al.*, is, essentially the position of the dissent in *Ramah Navajo*. The dissent argued that since the legal incidence of the tax was on the contractor, it should be upheld. 458 U.S. at 856 (Rehnquist, J., dissenting) (quoting *United States v. New Mexico*, 455 U.S. at 738). The seven-person majority rejected this argument and applied implied pre-emption analysis. The "legal incidence" test is only crucial for determining the type of analysis to apply to a case. If the legal incidence of tax is on an Indian tribe or a member of the tribe, a state cannot enforce the tax "absent clear congressional authorization." *Chickasaw Nation*, 515

U.S. at 459. If the legal incidence is on a non-Indian, the Court balances the Federal, tribal and state interests. *Ibid.*

Moreover, Justices Rehnquist and Stevens noted in their dissent in *Ramah Navajo* that the "legal incidence" analysis from cases such as *United States v. New Mexico* is different if the issue involves the exercise of tribal sovereignty. Then Justice Rehnquist said,

> But apart from those rare instances in which the State attempts to interfere with the residual sovereignty of a tribe to govern its own members, the "tradition of tribal sovereignty" merely provides a 'backdrop' against which the pre-emptive effect of federal statutes or treaties must be assessed.

458 U.S. at 838 (Rehnquist, J., dissenting). This case involves one of those "rare instances" alluded to because a state tax has an effect on the sovereign authority that Indian tribes have over road construction projects within their boundaries.

C. Commercial Leasing Cases do not Apply to Cases Involving Tribal Sovereignty.

Arizona and *amici* National Conference of State Legislatures, et al., claim that this Court applies a categorical approach to taxation issues. Arizona and these *amici* rely on cases like *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and *Thomas v. Gay*, 169 U.S. 264 (1898), and assert that if there is a tax on a non-member of an Indian tribe, state taxation is permissible. Brief for Petitioner 11; Brief of National Conference of State Legislatures et al. 12-13. This line of cases involved taxation of commercial activities of non-members with an Indian tribe and not state taxation that affected governmental, policy decisions of an Indian tribe. *Colville, supra* (cigarette sales); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) (state taxes on missionaries for cattle grazed on reservation with consent of tribe); *Wagoner v. Evans*, 170 U.S. 588 (1898) (upholding taxation of cattle grazed on Indian reservation); *Thomas v. Gay*, 169 U.S. 264 (1898) (taxation of cattle of non-Indian lessee not invalid and

rejecting argument that taxation of cattle was taxation of the property of the tribe); *Maricopa & P. R.. Co. v. Territory of Arizona*, 156 U.S. 347 (1895) (upholding territorial taxation of railroad that ran through reservation); *Utah & Northern Ry. Co. v. Fisher*, 116 U.S. 28 (1885) (upholding state taxation of railroad that ran through reservation).[17] Thus, the *Thomas* line of cases stand for the proposition that states may tax the affairs of non-Indians "in cases in which essential tribal relations ***were not involved*** and where the rights of Indians would not be jeopardized. . . ." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973) (quoting *Williams v. Lee*, 358 U.S. 217, 219-20 (1959), and citing *Utah & Northern*) (emphasis added); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404, 1415-16 (1997) (citing *Thomas* for proposition that tax on non-member lessees too indirect to be tax on tribe, but recognizing that tribes have authority to protect right of self-government and to control their internal relations). *Thomas* does not apply here because Arizona's tax unlawfully infringes on the right of Indian tribes to make their own public policy decisions and it interferes with Federal and Tribal interests set forth in Federal law. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 & n.16 (1983).

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17. The railroad cases are also distinguishable because the facts showed that the federal government granted the rights of way to the railroads. *Maricopa & P. R. Co.*, 156 U.S. at 351(no evidence of consent and, therefore "to be treated as if obtained without the Indians' consent"); *Utah & N. Ry. Co.*, 116 U.S. at 32 (authority to construct the railroad came from treaty between United States and tribe, which recognized that the United States had previously granted permission to construct railroad). The railroad line of cases are examples of cases in which Congress' plenary authority in this area withdrew certain elements of tribal sovereignty. *See South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 798 (1998) (Congress plenary power over Indian tribes includes power to modify or eliminate tribal rights).

II. ARIZONA'S TAX SHOULD BE INVALIDATED BECAUSE TRIBAL ROAD CONSTRUCTION DECISIONS ARE FUNDAMENTAL CHOICES ABOUT SELF-GOVERNMENT.

The constitutional grant of authority to Congress

> and the "semi-independent position" of Indian tribes [has] given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 33333-34 & n.15; *Ramah Navajo*, 458 U.S. at 837. A state tax is invalid if it unlawfully infringes on the right of an Indian tribe to make its own laws and be governed by them. *Mescalero Apache Tribe*, 462 U.S. at 334 n.16; *Ramah Navajo*, 458 U.S. at 837; *Bracker*, 448 U.S. at 142; *Williams v. Lee*, 358 U.S. 217, 220 (1959). The constitutional principle set forth in *Bracker*, *Ramah Navajo*, and *Williams* is that tribal sovereignty includes the right to make public policy decisions that affect the members of an Indian tribe, as well as non-members who carry out those public policy decisions on Indian reservations. Arizona and *amici* States and National Conference of State Legislatures cite no constitutional or statutory authority that allows states to impose new variables into the decision-making process of Indian tribes. They cite no such authority because the founding fathers did not leave to states residual authority to impose legal requirements that affect the political decision by Indian tribes. *Williams*, 358 U.S. at 220 (question has always been whether state action infringes on the right of Indians to make their own laws and be ruled by them); *Rice v. Olson*, 324 U.S. 786, 789 (1945) (policy of leaving "Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

A. Congress Foreclosed Governmental Impediments to Self-Determination Decisions

Congress has legislated in this area and said that only Indian tribes have the right to determine the extent of their participation in government contracts. Pub. L. 103-413, § 203(2), 108 Stat. at 4271. When Congress passed the Tribal Self-Governance Act of 1994, it was reacting to the protests by Indian tribes about restrictions on tribal self-governance. Tribal leaders complained to Congress and it enacted legislation, in part, because the BIA was substituting its views for those of Congress and Indian tribes. S. Rep. 103-374, 103d Cong., 2d Sess. at 3 (1994). The Senate found that the BIA regulations imposed more restrictive requirements, as well as new obstacles and burdens on tribal self-governance. *Ibid.* The House of Representatives found that the federal bureaucracy had eroded tribal self-government. H.R. Rep. 103-653, 103d Cong., 2d Sess. at 6 (1994). Congress responded, passed the Tribal Self-Governance Act of 1994, and prohibited government from placing impediments to tribal decisions on self-government.

It is clear from the legislative history that the policy of Congress is that the decision regarding whether an Indian tribe wants to enter into a contract is a decision that must be made freely by each tribe. Pub. L. 103-413, § 203(2), 108 Stat. at 4271. A tribal decision not to enter into a Self-Determination contract is an expression of the inherent sovereignty of a tribe. *Ibid.* §§ 202-03, 108 Stat. at 4270-71 (findings and declaration of policy). The Federal Government is not allowed to coerce the tribal decision-making process. *Ibid.* § 203(2), 108 Stat. at 4271. The BIA leaves to each tribe the initiative to make requests for contracts and acknowledges that the decision to not enter into a contract is an "equal expression of self-determination." 25 C.F.R. § 900.3(b)(5); *see also* Proclamation No. 5049, 48 Fed. Reg. 16,227 (1983) (Federal Government to eliminate excessive "government intervention" that has "stifled local decisionmaking").

When this Court interprets Federal statutes, such as the Self-Determination Act, it liberally construes statutes in favor of

establishing Indian rights. *See generally South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789,798 (1998); Felix S. Cohen, *Handbook of Federal Indian Law* 224 (1982 ed) (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Conversely, the Court narrowly construes statutes when Indian rights are abrogated or limited. *Handbook of Federal Indian Law* 225. Since the issue is whether Arizona's tax limits the tribal right of self-determination, the Court should resolve all doubts in favor of free exercise of the right of self-determination. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *McClanahan*, 411 U.S. at 174; 25 C.F.R. § 900.3(a)(5) (regulations to be liberally construed).

When an Indian tribe exercises its right of self-determination, an assertion of state authority must be viewed against any interference with the assertion of that right. *Mescalero Apache Tribe*, 462 U.S. at 336 (when a tribe undertakes activity authorized by federal law, assertion of state authority must be viewed against interference with successful accomplishment of the federal purpose). Congress has not granted to states the right to affect tribal decisions regarding reservation infrastructure. *See* Pub. L. 103-413, § 203(2), 108 Stat. at 4271. Given Congress' broad statement to allow Indian tribes to "choose the extent of their participation" and its desire to eliminate governmental obstacles to free choice, the Court should conclude that the Self-Determination Act precludes states from imposing financial factors into the decision-making processes of Indian tribes. *See Mescalero Apache Tribe*, 462 U.S. at 340 (unlikely Congress would have authorized participation in tribal management if it were thought that a state was free to nullify the entire arrangement); *Bracker*, 448 U.S. at 142-43 (interference with right of self-government is an independent barrier to imposition of state taxes). If the Court allows Arizona's tax in this instance, it will nullify Congress' express finding that tribes be allowed to "choose the extent of participation" in Self-Determination Act contracts.

B. The Tax Affects Tribal Decisons under the Self-Determination Act

Arizona's tax will have a profound effect on the way in which Indian tribes will make Self-Determination decisions. Road construction is a central function of all levels of government. The Federal Government builds and maintains the interstate highway system, as well as roads in national parks and across federal land. States construct and maintain state highways. Counties and municipalities build roads.

Tribal governments also decide when, where, and how to build roads. *See* 23 U.S.C. § 204(j); 25 U.S.C. § 450a(b); 25 C.F.R. §§ 170.4a, 900.119. These decision are about the basic infrastructure on Indian reservations, which affect tribal economies. *Cf.* 137 Cong. Rec. E3566 (daily ed. Oct. 28, 1991) (statement of Rep. Miller that roads on reservations are part of safe and modern infrastructure). From 1986-90, the time period at issue in this case, Indian tribes prioritized the roads to be built, decided whether the roads should be paved or gravel, and whether to build the roads itself or allow the BIA to let the contract. *See, e.g.*, J.A. 35. Tribal decisions about road construction activities and tribal procurement procedures on reservations are classic examples of an Indian tribe making its own laws and being ruled by them. *Bracker*, 448 U.S. at 142.

Indian tribes will have to handle their own budgets in fiscal year 2000 under the recently enacted transportation statute. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155. Indian tribes will have to prioritize road construction projects. Each tribe has to determine whether it has the resources and expertise to enter into a contract itself, or the resources to hire people who can provide it with the expertise necessary to enter into a Self-Determination Act contract. An Indian tribe also has to factor into the equation whether it truly needs to build, for example, $1 million of roads, or whether it can get by with $950,000 in roads ($1 million minus a 5% transaction privilege tax).[18] If a tribe needs all $1 million of roads, it will be forced to enter into Self-Determination contracts.

18. In its brief, the United States claims that there is no basis for the (Cont'd)

The record in this case shows how the taxes will affect governmental policy. Arizona has imposed $1.2 million in taxes on Blaze Construction. If these taxes are permitted, they will be included in future bids for road construction projects and will reduce the miles of roads built. J.A. 33. If $1.2 million is removed from the budget, the San Carlos road project could have been completely eliminated. *See* R.7, Exh. A at 26 (cost of road project $839,688.12). Alternatively, the Navajo Nation could have been forced to make decisions and eliminate certain aspects of the "Blue Gap" project. *Ibid.* at 26-27 (itemized costs of "Blue Gap" project). In the future, the Navajo government may have to choose whether it will forego paving access to the Chapter House or which cluster of Indian houses will not receive paved roads. Consequently, Arizona's tax is the equivalent of the "power to destroy" governmental decisions by this Nation's Indian tribes.

Indian tribes must also factor into their thought process the possibility that a contract will be returned to the BIA under reassumption or retrocission, and the effect that this will have on its members. 25 C.F.R. §§ 900.240-.241, 900.246-.247. If the project started out as a $1 million project to be performed by the

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testimony of its BIA official, Eddie Ward. Brief of the United States 23 n.14. The Government's statement to this Court is disingenuous. Federal law required BIA officials to know about fiscal constraints and pass that information along to Indian tribes. 25 C.F.R. § 271.4(e) (1996) (duty to inform tribes of realities of funding). Mr. Ward's testimony simply proves that he knows how to carry out his statutory obligations and execute the Government's trust responsibilities. Mr. Ward's statements provide the Court with a description of how the Federal Government works with Indian tribes at the local level. His remarks are proof that local BIA officials know about budgetary constraints, that if a tax has to be paid by a contractor it is included in a bid submitted to the Government, and that tax has the net effect of reducing the miles of roads built. Moreover, if there was no basis for Mr. Ward's testimony, it was the obligation of counsel for the State of Arizona to either object or show on cross-examination that the testimony lacked foundation, which it did not. *See supra* n.3. On appeal, this Court cannot presume that there is no foundation for the testimony of Mr. Ward. If anyone knows how the Indian road construction statutes and regulations really work, it is a government official who interprets them every day.

Indian tribe, then no state transaction privilege taxes apply. Theoretically under its argument, Arizona could assert that it has the right to impose the tax in the event of retrocession or reassumption. Allowing states to tax a contract after retrocession or reassumption is unfair to expectations of Indian tribes and to contractors. Even though the BIA must provide the same level of funding for the project if it is returned, *ibid.* §§ 900.244, 900.256, there is no provision in the statutes or regulations for any additional funding to take into consideration the imposition of new state taxes after the formation of a construction contract. If the state taxed a contractor and the BIA allowed the new taxes to be factored into the cost of the project, it would mean that the Indian tribe would receive fewer miles of roads than it bargained for when it entered into the Self-Determination Act contract. If the tax were imposed on a contractor and the BIA did not allow the new tax to be included in the cost of the project, it would be unfair to the contractor because it entered into a contract in a situation in which there was no legal obligation to pay state transaction privilege (or gross receipts) taxes, but then would face new taxes if the contract is reassumed by or retroceded to the BIA.[19]

The Court should conclude that Arizona's tax is pre-empted because it infringes on the free exercise of the sovereign right of Indian tribes to self-governance.

III. THE STATE TAX FAILS BECAUSE IT IS PRE-EMPTED BY FEDERAL LAW.

This Court does not presume that the tax is either valid or invalid even though the legal incidence of Arizona's tax is on Blaze

19. States could take the position, for example, that they were entitled to levy taxes on any future payments to the contractor. Such a claim would then create disputes between the tribe because of its expectations on the scope of the contracts, the Federal Government's budgetary constraints and trust obligations, and the contractor. This hypothetical scenario shows the extent of federal regulation of road construction projects and the ways in which state taxes will interfere with the operation of federal and tribal policy. The Self-Determination Act regulations are further indicia of why state taxes are pre-empted by Federal law.

Construction. *See Chickasaw Nation*, 515 U.S. at 459. Arizona wrongly asserts that a state tax of a non-member of an Indian tribe is not pre-empted by Federal law unless there is a clear statement of Congressional intent. Brief for Petitioner 17. There is no requirement that Congress specifically prohibit taxation of Blaze. *Cotton Petroleum*, 490 U.S. at 176-77 ("federal pre-emption is not limited to cases in which Congress has expressly — as compared to impliedly — pre-empted the state activity"); *Mescalero Apache Tribe*, 462 U.S. at 334 (cases reject proposition that pre-emption requires express statement); *Bracker*, 448 U.S. at 144. Congressional intent is not the sole factor for determining whether state law is pre-empted. *Mescalero Apache Tribe*, 462 U.S. at 334. This Court must balance the tribal, federal and state interests to see if there is sufficient justification for the assertion of Arizona's tax to determine if it is pre-empted by federal law. *Mescalero Apache Tribe*, 462 U.S. at 334; *Ramah Navajo*, 458 U.S. at 838; *Bracker*, 448 U.S. at 143-44.

Cotton Petroleum did not change this Court's implied pre-emption analysis. The Court merely distinguished *Bracker* and *Ramah Navajo* because both Arizona and New Mexico did not assert any legitimate regulatory interest to justify its tax and there was comprehensive federal regulation of reservation roads, timber harvesting, and construction of schools. 490 U.S. at 184-85. The Court contrasted the previous two cases from the record before it, which showed that New Mexico regulated oil wells. *Ibid.* at 185-86. Consequently, the Court concluded that "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Ibid.* at 186. The continued vitality of *Bracker* and *Ramah Navajo*, is shown by the Court's consistent citation to these cases on the standard for implied pre-emption analysis. *See Milhelm Attea*, 512 U.S. at 73 (Justice Stevens writing for unanimous Court and citing *Bracker* as main authority and his decision in *Cotton Petroleum* as "see also" authority); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700, 1708 (1998) (Stevens, J., dissenting) (no citation to *Cotton Petroleum*, but calling for application of *Bracker* implied pre-emption analysis for sovereign immunity question).

Arizona also argues that federal regulations are not controlling for pre-emption analysis unless the purpose of the regulation "plainly supports policies to protect Indian tribes and their members from impermissible state taxes." Brief for Petitioner 27. This is not the law. This Court examined federal regulations in *Bracker* to determine whether Arizona's taxing scheme was pre-empted by federal law. 448 U.S. at 146-48, 151 n.15 (decision based on "pre-emptive effect of the comprehensive federal regulatory scheme"). Federal regulations must be liberally interpreted in favor of Indians. *See, e.g.*, 25 C.F.R. § 900.3(a)(5) (interpretation of Self-Determination Act regulations).

The balance of the Federal, tribal and state interests necessitates the conclusion that Arizona's tax is pre-empted by Federal law.

1. *Federal Interests*

Blaze Construction respectfully disagrees with the Solicitor General that there is no impingement on the interests of the Federal Government. Brief of United States 26. Arizona's tax interferes in a complex area of law and will affect how local BIA official, such as Eddie Ward, carry out the United States' trust responsibilities toward Indian tribes.

a. Comprehensive Regulatory Scheme

Congress has regulated by statute all aspects of road construction for Indian reservations. One significant aspect of Congressional regulation is to differentiate the manner in which reservation roads are prioritized and built. Rather than budgeting for a department or a specific project, starting in fiscal year 2000, Congress will appropriate money for each tribe based on a formula established by regulations. Pub. L. 105-178, § 1115(b)(4), 112 Stat. at 155. Once that money is allocated, each tribe becomes involved in the process of determining which roads will be built, who will be responsible for the contracts and, perhaps, for awarding the contracts. Each tribe works with the Secretary of the Interior for road projects. 23 U.S.C. § 204(e). The Federal Government cannot spend one dime for planning or construction without first

consulting with the affected tribe. 25 C.F.R. § 900.119. Indian tribes select the projects, which are then approved by the Secretary. 23 U.S.C. § 204(a); 25 C.F.R. § 170.4a. In contrast, the BIA only has the authority to "recommend" construction projects. 25 C.F.R. § 170.4a. These detailed road regulations are part of a comprehensive, Federal regulatory scheme. *Bracker*, 448 U.S. at 147-48 (discussing comprehensive nature of road regulations previously published at 25 C.F.R. Part 162).

Congress has also extensively regulated when and how Indian tribes are to enter into contracts under the Self-Determination Act. A tribal decision on whether to enter into a Self-Determination Act contract is not part of the typical procurement process. 25 C.F.R. § 900.115(a)-(b). It is a government-to-government agreement. Pub. L. 103-413, §§ 202-03, 108 Stat. at 4270-71. Nowhere in the statutes or regulations does the Federal Government allow states to participate in or influence an Indian tribe's decision on whether to enter into a Self-Determination Act contract, or at what stage of the construction process a tribe can intervene (e.g., planning or construction).[20]

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20. Blaze Construction acknowledges that in *Cotton Petroleum* the Court said that the Self-Determination Act did not "express a congressional intent to pre-empt state taxation of oil and gas lessees." 490 U.S. at 183 n.14. *Cotton Petroleum* did not, however, involve self-determination for a truly governmental function — infrastructure on reservations that serves members of that Indian tribe. The record in *Cotton Petroleum* dealt with oil and gas leases with an Indian tribe, which are commercial activities.

Moreover, the *Cotton Petroleum* case was not a proper case for determining whether the Self-Determination Act had a pre-emptive effect on state taxes. The corporation primarily argued that the case was governed by the traditional commerce clause analysis. There was tension between the contractor and the Jicarilla Apache Tribe. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 435 n.233 (1993). The corporation asserted that the burden of state and tribal taxation impermissibly burdened interstate commerce and that the case was not a preemption case. *See Cotton Petroleum v. State*, 106 N.M. 517, 519, 745 P.2d 1170, 1172 (Ct. App. 1987). Given Cotton Petroleum's belief

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The federal scheme for road construction and exercise of choice under the Self-Determination Act is so pervasive that Arizona's tax is precluded. *Bracker*, 448 U.S. at 148.

b. Effect on Trust Responsibilities

The United States' trust responsibilities originate from Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1, 16 (1831), in which he described the relationship between the United States and Indian tribes as one that "resembles that of a ward to his guardian." The Government's trust responsibilities apply to the conduct of executive agencies. *Handbook of Federal Indian Law* 225. Executive agencies must adhere to "moral obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), and are bound to

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that the case was an interstate commerce issue, it had no incentive to develop a record on the interests of the Jicarilla Apache Tribe and did not develop a record on this point. The business claimed that the impact on the tribe was minimal and not a primary consideration. *Ibid.* at 519, 745 P.2d at 1172. Consequently, the district court found, and the corporation did not seriously disagree, that the taxes "did not impact the Tribe." *Ibid.* at 521, 745 P.2d at 1174. The Jicarilla Apache Tribe filed an *amicus* brief with the New Mexico Court of Appeals and argued that the case was governed by the pre-emption analysis employed by this Court in *Bracker* and *Ramah*. *Ibid.* at 519, 745 P.2d at 1172. New Mexico also considered the case governed by the preemption decisions of the Court. When the New Mexico Court of Appeals wrote its decision, it focused most of its attention and analysis on the corporation's commerce clause argument that the state taxes had to be proportional to the amount of benefits conferred. The lower court's preemption analysis was almost an afterthought and was included at the end of the opinion. *Ibid.* at 521-22, 745 P.2d at 1174-75 ("we feel constrained, in light of the Supreme Court's criticism in *Ramah*, 458 U.S. at 846 . . . , to discuss briefly the contentions made by the state and the Tribe"). When Cotton Petroleum filed its petition for a writ of certiorari, the Jicarilla Apache Tribe asked the Court to deny certiorari. *See* Brief of the Jicarilla Apache Tribe as Amicus Curiae in Opposition to Appellants at 3, *Cotton Petroleum Corp. v. Department of Revenue*, 490 U.S. 163 (1989) (No. 87-1327); *Frickey*, 107 Harv. L. Rev. at 435 n.233.

discharge their obligations "with good faith and fairness." *United States v. Payne*, 264 U.S. 446, 448 (1924); *Handbook of Federal Indian Law* 226. The ordinary standards of a private fiduciary apply to executive officials administering federal programs. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

In carrying out these obligations and in complying with Federal law, the BIA officials who administer the road construction funds and interact with Indian tribes will be constrained by the impact of state taxes. For example, assume that Congress allocates $2 million in fiscal 2000 for road construction activities on the Navajo Reservation. The BIA officials know that if the Navajo tribe enters into a Self-Determination Act contract for road construction in Arizona, the $2 million budget will not be reduced by state taxes. *See generally* Arizona Transaction Privilege Tax Ruling 95-11 at 3, Ariz. St. Tax Rep. (CCH) ¶ 300-192. The BIA officials also know that if the BIA enters into the contract and the state tax applies, there will be 5% fewer miles of roads built. J.A. 33. As a trustor for the Indian tribes, the Federal Government is obligated to look out for the best interests of the tribes. To comply with this obligation, the BIA has an obligation to tell the Navajo Nation about the adverse fiscal consequences of a choice not to enter into a Self-Determination Act contract. *Cf.* 25 C.F.R. § 271.4(e) (1996) (required to inform tribes of "current realities of funding"). In fact, the BIA's regulations require the Federal Government to remove "any obstacles" that hinder tribal autonomy and flexibility for road construction projects 25 C.F.R. § 900.3(b)(1). Arizona's tax interferes with the Federal Government's participation in its government-to-government dealings with Indian tribes.

2. *Tribal Interests*

Each Indian tribe has an interest in maintaining its sovereignty and providing proper infrastructure to its members. The State's tax infringes on the tribal right of self determination and affects the number of miles of roads built or maintained by the BIA.

Indian tribes have significant contacts with road construction projects even if they do not contract directly with an entity like Blaze Construction. Rather it is the Federal Government that is constrained. The BIA cannot spend any money without consulting with a tribe and following tribal preferences to the extent possible. 25 C.F.R. § 900.119. Indian tribes participate in the planning, conduct and administration of federal programs. 25 U.S.C. § 450a(b). The BIA "recommends" projects, but the Indian tribes set the priorities. 25 C.F.R. § 170.4a. Even if the BIA contracts with an entity like Blaze, the BIA must keep Indian tribes of the ongoing status of construction projects. *Stewardship Plan* 29.

Some Indian tribes may not have the expertise or resources to manage their own contracts. A large tribe such as the Navajo Nation may have the skills to administer its own contract for road construction, but it may not have the expertise to handle the construction of a medical facility. Similarly, some smaller tribes in Arizona, such as the Havasupai in northern Arizona, may not have the financial resources of larger or wealthier tribes. Congress did not intend for smaller tribes, which often have the greatest needs, or tribes without expertise in an area, to suffer a 5% penalty if they do not enter into a Self-Determination Act contracts.

3. *State Interests*

The exercise of state authority that imposes additional burdens on an Indian tribe must be justified by functions or services performed by a state in connection with the on-reservation activity. *Mescalero Apache Tribe*, 462 U.S. at 336, 341-42; *Ramah Navajo*, 462 U.S. at 336. A state must point to more than its general interest in raising revenues. *Mescalero Apache Tribe*, 462 U.S. at 336; *Ramah Navajo*, 462 U.S. at 336. The Court has not retreated from the standard that a state's interest is strongest when there is some regulation of the on-reservation activity.[21] *See Hoopa Valley*

21. Arizona improperly claims that in *Cotton Petroleum* the Court abandoned any analysis of a State's on-reservation activities to justify taxation. In support of this proposition Arizona cites to page 189 of the Court's opinion. Brief for Petitioner 23 (quoting *Cotton Petroleum*, 490 U.S. at 189). On page

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Tribe v. Nevins, 881 F.2d 657, 660 (CA9 1989) (discussing *Cotton Petroleum*, *Ramah Navajo*, and *Bracker*, and invalidating state tax because it because California played no role in the tribe's timber activities), *cert. denied*, 494 U.S. 1055 (1990); Pet. App. 21-24.

For example, in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 n.12 (1973), the Court unanimously rejected Arizona's contention that general services it provided to Indians were sufficient to support the State's right to impose an income tax. Arizona argued then, as it does now, that it was expending tax monies for the education and welfare within the Navajo reservation. *Ibid.*; *see also* Brief for Petitioner 6. The Court rejected this argument in *McClanahan*, pointing out that the Federal Government defrays 80% of Arizona's social security payments to reservation Indians under 25 U.S.C. § 639, and had authorized the expenditure of more than $88 million for rehabilitation programs for Navajos and Hopis living on the reservations. *Ibid.* The Court stated, " '[C]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their Tribal organization.' " *Ibid.* at 173 (quoting *The Kansas Indians*, 5 Wall. (72 U.S.) 737, 757 (1867)).

Similarly in *Ramah Navajo*, the Court rejected New Mexico's argument that services provided to the contractor off the reservation justified the imposition of its gross receipts tax. 458 U.S. at 843-45 & n. 10 (no evidence benefits related to school construction).

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189, the Court addressed Cotton Petroleum's argument that the value of services provided by New Mexico exceeded the costs to the reservation, i.e., a *quid pro quo* argument. The Court discussed implied pre-emption analysis in section III and not section IV of the opinion. Arizona also misapplies *Cotton Petroleum* when it contends that even if state services are still relevant, Blaze Construction and the Arizona Court of Appeals improperly focused on direct services and not "intangibles." Brief for Petitioners 24. Again, Arizona is not relying on the portion of the opinion addressing pre-emption, but cites to a passage dealing with proportionality of taxes. Arizona's position is a classic example of quoting pronouncements of this Court out of context.

New Mexico argued that it spent $390,000 on the Navajo Reservation. New Mexico's Motion to Dismiss or Affirm at 6, *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (No. 80-2162). This Court found that such generalizations were an insufficient basis for the tax. 458 U.S. at 844. The Court has not overruled *McClanahan* or *Ramah*. The Arizona Court of Appeals correctly applied the precedents of this Court when weighing the state's interest and properly found that general money for state education or state highways is insufficient to outweigh the comprehensive federal regulations. Pet. App. 21-25.

In this case, Arizona does not regulate any aspect of road construction projects on Indian reservations. Arizona admits that it did not provide any services for the construction projects, took no responsibility for reservation roads after the reservation boundaries, provided no maintenance for the roads, and did not provide any employment services. J.A. 21, 38-40. The State of Arizona has no interest in the construction or maintenance of roads that almost exclusively serve members of Indian tribes. Arizona's only interest is in raising revenue. Arizona's interest is clearly outweighed and pre-empted by the extensive statutes and regulations governing the free exercise of tribal self-determination decisions and federal and tribal interests in road construction projects. *See Ramah Navajo*, 462 U.S. at 336.

III. THE COURT OF APPEALS DECISION DOES NOT FOSTER UNCERTAINTY.

For cases involving disputes between Federal, tribal and state authority, there is no bright-line rule. *See City of Detroit v. Murray Corp.*, 355 U.S. 489, 496 (1958) (Frankfurter, J., concurring). The touchstone in Federal, state and tribal matters is the Constitution and Congress' plenary authority to regulate intercourse with Indian tribes. *See, e.g., McClanahan*, 411 U.S. at 168-72. The application of the Indian Commerce Clause balancing test in this case is no different from the tests used by this Court to resolve cases under Interstate and Foreign Commerce Clauses.

When this Court analyzes state taxes that are challenged under each provision under Article I, § 8, cl. 3, it does not apply a bright-line test. Instead, the Court applies multi-pronged balancing tests. There is one common denominator in each test: Whether the State can show that the tax is related to services provided by it. *Bracker*, 448 U.S. at 143-44; *Japan Line*, 441 U.S. at 446-46 (foreign commerce); *Complete Auto Transit*, 430 U.S. at 279 (interstate commerce). The Foreign and Indian Commerce Clause tests also take into consideration whether the State tax impairs the Federal Government. *Bracker*, 448 U.S. at 143-44; *Japan Line*, 441 U.S. at 446-47.

To the extent that certainty is available in this area of law, the Court can only provide it in one of two ways. First, the Court could return to its analysis in *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832), and the original intent of framers of the Constitution that states have no right to intervene in the internal affairs of Indian tribes.[22] The Court has repeatedly said that it will not return to this analysis. *E.g.*, *Ramah*, 458 U.S. at 845-46 (rejecting Solicitor General's argument that on-reservation activities are presumptively beyond the reach of the States).

The other option is to continue to employ the implied pre-emption test. The decision by the Arizona Court of Appeals fosters doctrinal certainty for Indian law. The court of appeals' decision keeps intact the implied pre-emption analysis for all taxing matters. Application of a multi-part balancing test for this case is consistent with the test that the Court applies to non-discriminatory taxes under the Interstate and Foreign Commerce Clauses. The decision by the Arizona Court of Appeals says that whenever a state tax affects issues of tribal self-determination, including road construction contracts, the federal and state courts must balance

22. *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States* 380-82 (R. Rotunda & J. Nowak eds. 1987) ("The constitution has wisely disembarrassed the power of these two limitations; and has thus given to congress, as the only safe and proper depositary, the exclusive power, which belonged to the crown in the ante-revolutionary times; a power indispensable to the peace of the states, and to the just preservation of the rights and territory of the Indians.").

the federal, state and tribal interests. State government will know whether their taxing schemes are permissible, particularly if the government is not involved in any on-reservation regulation of the activity at issue.

Moreover, affirming the decision below allows this Court to explain the doctrinal distinction that it has maintained under its modern pre-emption analysis. There is a fundamental, doctrinal difference between a historically commercial enterprise such as a lease of an oil well or the sale of cigarettes, and a tax that affects tribal decisions about a basic function of government — whether to perform some activity for the health, safety and welfare of its citizens/members and whether to build roads for them. States neither expressly, nor impliedly through taxation, have the right to affect the public policy decisions of Indian tribes

Arizona's position does not provide doctrinal clarity. Instead, it turns the Constitution on its head. Two hundred years ago, the founding fathers presumed that states had no authority to regulate non-Indians inside the boundaries of an Indian reservation. *See, e.g., Worcester, supra*. Arizona now wants this Court to presume that states have the authority to tax or regulate those same non-Indians inside the boundaries of an Indian reservation. Arizona wants the Court to do away with the requirement that there be a relationship between taxation and governmental regulation on reservations for Indian Commerce Clause cases, even though states still must show a correlation between taxes and state regulation for interstate and foreign commerce matters. The Court should reject Arizona's attempt to overstep its bounds as it has done on many occasions in the past.

CONCLUSION

For the foregoing reasons, Respondent Blaze Construction Company, Inc. requests that the United States Supreme Court affirm the opinion by the Arizona Court of Appeals and remand this case to the Arizona Tax Court for an award of attorney's fees under Arizona law. Ariz. Rev. Stat. Ann. § 12-348(A)(1).

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A — RELEVANT STATUTES AND REGULATIONS INVOLVED

STATUTES

25 U.S.C. § 450a. Congressional declaration of policy

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450h. Grants to tribal organizations or tribes

(a) Request by tribe for contract or grant by Secretary of the Interior for improving, etc., tribal governmental, contracting, and program planning activities

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to section 13 of this title, and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for —

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(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

TRIBAL SELF-GOVERNANCE ACT OF 1994
PUB. L. 103-413
108 Stat. 4250, 4270-71 (1994)

SEC. 201. SHORT TITLE.

This title may be cited "The Tribal Self-Governance Act of 1994".

SEC. 202. FINDINGS.

Congress finds that —

(1) The tribal right of self-governance flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal Statutes, and the course of dealings of the United States with Indian tribes;

(3) although progress has been made, the Federal bureaucracy, with its centralized rules and

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regulations, has eroded tribal self-governance and dominates tribal affairs;

* * *

SEC. 203. DECLARATION OF POLICY

It is the policy of this title to permanently establish and implement tribal self-governance —

(1) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;

(2) to permit each Indian tribe to choose the extent of the participation of such tribe in self governance;

* * *

TRANSPORTATION EQUITY ACT FOR THE 21ST CENTURY
Pub. L. 105-178
112 Stat. 107, 155 (1998)

An Act to authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

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SEC. 1115. FEDERAL LANDS HIGHWAYS PROGRAM.

* * *

(b) ALLOCATIONS. — Section 202(d) of such title is amended —

* * *

(4) by adding at the end the following:

"(2) FISCAL YEAR 2000 AND THEREAFTER.—

"(A) IN GENERAL. — All funds authorized to be appropriated for Indian reservation roads shall be allocated among Indian tribes for fiscal year 2000 and each subsequent fiscal year in accordance with a formula established by the Secretary of the Interior under a negotiated rulemaking procedure under subchapter III of chapter 5 of title 5.

"(B) REGULATIONS. — Notwithstanding sections 563(a) and 565(a) of title 5, the Secretary of the Interior shall issue regulations governing the Indian reservation roads program, and establishing the funding formula for fiscal ***155** year 2000 and each subsequent fiscal year under this paragraph, in accordance with a negotiated rulemaking procedure under subchapter III of chapter 5 of title 5. The regulations shall be issued in final form not later than April 1, 1999, and shall take effect not later than October 1, 1999.

"(C) NEGOTIATED RULEMAKING COMMITTEE. — In establishing a negotiated rulemaking committee to carry out subparagraph (B), the Secretary of the Interior shall —

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"(i) apply the procedures under subchapter III of chapter 5 of title 5 in a manner that reflects the unique government-to-government relationship between the Indian tribes and the United States; and

"(ii) ensure that the membership of the committee includes only representatives of the Federal Government and of geographically diverse small, medium, and large Indian tribes.

"(D) BASIS FOR FUNDING FORMULA.--The funding formula established for fiscal year 2000 and each subsequent fiscal year under this paragraph shall be based on factors that reflect —

"(i) the relative needs of the Indian tribes, and reservation or tribal communities, for transportation assistance; and

"(ii) the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each Bureau of Indian Affairs area, geographic isolation and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.

"(3) CONTRACTS AND AGREEMENTS WITH INDIAN TRIBES. —

"(A) IN GENERAL. — Notwithstanding any other provision of law or any interagency agreement, program guideline, manual, or policy directive, all funds made available under this title for Indian reservation roads and for highway bridges located on Indian reservation roads to pay for the costs of programs, services, functions, and activities, or portions

thereof, that are specifically or functionally related to the cost of planning, research, engineering, and construction of any highway, road, bridge, parkway, or transit facility that provides access to or is located within the reservation or community of an Indian tribe shall be made available, upon request of the Indian tribal government, to the Indian tribal government for contracts and agreements for such planning, research, engineering, and construction in accordance with the Indian Self-Determination and Education Assistance Act.

FEDERAL REGULATIONS

ROAD CONSTRUCTION CONTRACTS

25 C.F.R. § 169.3 Consent of landowners to grants of right-of-way.

(a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

25 C.F.R. § 170.5 Right-of-way.

(a) The procedure for obtaining permission to survey and for granting any necessary right-of-way are governed by part 169 of this chapter. Tribal consent as required under § 169.3(a) may be made by public dedication where proper tribal authority exists. Before any work is undertaken for the construction of road projects, the Commissioner shall obtain the written consent of the Indian landowners. Where an Indian has an interest in tribal land by virtue of a land use assignment, such consent shall be obtained from both the landholder of the assignment

and the Indian tribe. Right-of-way easements are to be on a form approved by the Commissioner.

CONTRACTS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

25 C.F.R. § 900.3 Policy statements.

(a) Congressional policy.

* * *

(2) Congress has declared its commitment to the maintenance of the Federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal government, capable of administering quality programs and developing the economies of their respective communities.

* * *

(5) Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal

organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under the Act, including all related administrative functions, from the Federal government to the contractor.

* * *

(b) Secretarial policy.

* * *

(1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

* * *

(4) The Secretary recognizes that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility

and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(5) The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

* * *

(7) The Secretary is committed to implementing and fully supporting the policy of Indian self-determination by recognizing and supporting the many positive and successful efforts and directions of tribal governments and extending the applicability of this policy to all operational components within the Department. By fully extending Indian self-determination contracting to all operational components within the Department having programs or portions of programs for the benefit of Indians under section 102(a)(1)(A) through (D) and for the benefit of Indians under section 102(a)(1)(E), it is the Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities. It is also the policy of the Secretary to have all other operational components within the Department work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality.

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25 C.F.R. § 900.115 How do self-determination construction contracts relate to ordinary Federal procurement contracts?

(a) A self-determination construction contract is a government-to-government agreement that transfers control of the construction project, including administrative functions, to the contracting Indian tribe or tribal organization to facilitate effective and meaningful participation by the Indian tribe or tribal organization in planning, conducting, and administering the construction project, and so that the construction project is responsive to the true needs of the Indian community. The Secretary's role in the conduct of a contracted construction project is limited to the Secretary's responsibilities set out in § 900.131.

* * *

(b) Self-determination construction contracts are not traditional "procurement" contracts.

25 C.F.R. § 900.119 To what extent shall the Secretary consult with affected Indian tribes before spending funds for any construction project?

Before spending any funds for a planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary shall consult with any Indian tribe or tribal organization(s) that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible concerning: size, location, type, and other characteristics of the project.

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25 C.F.R. § 900.124 May the Indian tribe or tribal organization to use a grant in lieu of a contract?

Yes. A grant agreement or a cooperative agreement may be used in lieu of a contract under Sections 102 and 103 of the Act when agreed to by the Secretary and the Indian tribe or tribal organization. Under the grant concept, the grantee will assume full responsibility and accountability for design and construction performance within the funding limitations. The grantee will manage and administer the work with minimal involvement by the government. The grantee will be expected to have acceptable management systems for finance, procurement, and property.

25 C.F.R. § 900.240 What does retrocession mean?

A retrocession means the return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.

25 C.F.R. § 900.241 Who may retrocede a contract, in whole or in part?

An Indian tribe or tribal organization authorized by an Indian tribe may retrocede a contract.

25 C.F.R. § 900.244 Will an Indian tribe or tribal organization's retrocession adversely affect funding available for the retroceded program?

No. The Secretary shall provide not less than the same level of funding that would have been available if there had been no retrocession.

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25 C.F.R. § 900.246 What does reassumption mean?

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization. There are two types or reassumption: emergency and non-emergency.

25 C.F.R. § 900.256 Will a reassumption adversely affect funding available for the reassumed program?

No. The Secretary shall provide at least the same level of funding that would have been provided if there had been no reassumption.

(13)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel. Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

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ARGUMENT

The issue in this case is whether Congress has pre-empted a state tax on a non-Indian contractor doing business with the United States on an Indian reservation. Respondent, Blaze Construction Co., Inc. ("Blaze"), cannot establish such pre-emption, "either expressly or by plain implication." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76. Blaze asserts that the tax that the State of Arizona ("State") imposed *should* be pre-empted by federal law, but most of its arguments are mere policy arguments that should properly be made to Congress, not to this Court. Moreover, none of the three branches of the federal government support Blaze's position that federal contractors should be immune from generally applicable state taxes for work performed on an Indian reservation. Congress clearly lacks intent to pre-empt: none of the statutes Blaze cites purports to reverse Congress' general acquiescence in state taxation of federal contractors and the primary statute relied upon by Blaze, the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, does not even regulate the contracts being taxed in this case. This Court plainly held that states may tax federal contractors in *United States v. New Mexico*, 455 U.S. 720 (1982), and in *Cotton Petroleum* the Court established the validity of state taxes on activities within Indian reservations that have only indirect effects on tribal interests. The brief filed by the United States in this case forcefully presents the executive branch's position that federal contractors doing work for the Bureau of Indian Affairs ("BIA") are subject to state taxes. In light of the federal government's complete lack of support for Blaze's policy arguments, and the clarity of the governing law, Blaze's claim of tax

immunity must fail, and this Court should reverse the court of appeals' contrary holding.

I. FEDERAL CONTRACTORS ARE TAXABLE UNDER THE GENERAL RULE OF *UNITED STATES v. NEW MEXICO*.

Blaze argues that state taxes imposed on Indian reservations should always be analyzed under implied pre-emption principles, utilizing a freewheeling balancing of interests. Blaze's position is unsupported by either reason or this Court's prior decisions. While this Court has developed flexible rules to consider issues of state taxation on Indian reservations, it has not developed this balancing of interests approach based upon any virtue inherent in flexibility, but because determining the bounds of state and tribal powers often requires it to analyze the interests at stake on a case-by-case basis. This Court has not hesitated, however, to adopt categorical rules when, as here, circumstances justify such rules.

For example, this Court has adopted a categorical rule that federal law pre-empts state taxes imposed directly on Indian tribes and tribal members. *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). In adopting a categorical rule, this Court explained:

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214 n.17 (1987); *see also Duro v. Reina*, 495 U.S. 676 (1990) (holding that Indian tribes may not assert criminal jurisdiction over nonmember Indians; rejecting lower court's test for determining criminal jurisdiction that would require the consideration of each individual's "contacts" with the reservation). Thus, balancing of interests is not required in every case, and the Court will adopt a bright-line test when the interests at stake do not require a case-by-case approach.

Here, the Court has repeatedly and thoroughly addressed the issue of federal contractor tax immunity and it is apparent that no federal tradition bars state taxation of such contractors. Similarly, because no tribe is a party to the contracts and no tribal money is used to pay the contractors, the effects of such taxation on the tribes are attenuated, uncertain, and indirect. *See* Br. for U.S. at 18-24. Accordingly, tribal sovereignty does not suggest that Congress intended to pre-empt state taxing jurisdiction. *See* Br. for Pet. at 15.

This Court adopted the categorical test applicable to the issue of direct taxes on tribal members because it can be assumed that state taxes will *always* directly and substantially infringe upon tribal interests. A similar, but opposite, conclusion is appropriate here. Where the state tax is imposed on a nonmember contracting with the United States, the Court can assume that the taxes will *never* directly and substantially infringe upon tribal interests. While this Court has been quick to protect tribes and

those with whom tribes do business from state laws against which they have few defenses, tribal interests in these transactions are remote and indirect and the United States' involvement ensures that any tribal concerns are not ignored.

Blaze's argument that the Constitution's Interstate Commerce and Foreign Commerce Clauses provide analogous examples of the use of balancing tests is unhelpful and wrong. Br. for Resp. at 22-24. Blaze confuses the multi-prong tests used to determine the validity of taxes under those clauses with the multi-factor balancing of interests test used in Indian implied pre-emption doctrine. Under the Interstate and Foreign Commerce Clauses, each of the enumerated factors must be satisfied; there is no balancing between them, i.e., a discriminatory tax on a foreign corporation cannot be saved because the taxpayer has an especially strong nexus with a state.[1]

Similarly, Blaze's argument that the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, somehow

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[1] In any event, application of the Interstate and Foreign Commerce Clause analyses here would lead to the Arizona tax being sustained, because both the four-part Interstate Commerce test and the six-part Foreign Commerce Clause test would easily be satisfied. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-29 (1981) (rejecting argument that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of services provided to the activity); *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (rejecting argument that state tax prevented the nation from speaking with one voice when Congress had not established a clear policy barring state taxation).

prevents this Court from adopting a bright-line test applicable to nontribal members who contract with the United States is not supported by the language of that clause or this Court's precedents. Br. for Resp. at 24, 42. The Indian Commerce Clause states that "Congress shall have Power . . . To regulate Commerce . . . with Indian Tribes." The tax at issue here is imposed on a contract between the United States and a business owned by a nontribal member. The language of the clause shows that it does not control here because there is no commerce *with* a tribe or tribal member. Moreover, this Court has held that the pre-emptive force of the Indian Commerce Clause is strictly limited. *See Cotton Petroleum*, 490 U.S. at 192 ("[T]he fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce 'among' States with the mutually exclusive territorial jurisdiction to trade 'with' Indian tribes.") and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes."). Thus, the Indian Commerce Clause provides no support for Blaze's arguments.

Therefore, this Court should apply the general rule that state taxes on federal contractors are permissible unless Congress expressly pre-empts them without regard to where in the country – on or off an Indian reservation – the contractors perform their work.

II. A STATE TAX ON CONTRACTS BETWEEN THE UNITED STATES AND NONTRIBAL MEMBERS IS NOT IMPLIEDLY PRE-EMPTED BECAUSE CONGRESS HAS NOT SHOWN BY PLAIN IMPLICATION ITS INTENT TO BAR SUCH A TAX.

A. Federal Law Does Not Pre-Empt Every State Tax That Affects Tribal Decision-Making.

Blaze's principle argument is that the Arizona tax should be pre-empted because it affects tribal decision-making. Such a grossly overbroad reading of federal pre-emption is simply not the law. This Court expressly rejected Blaze's position in *Cotton Petroleum*, where it found no support in modern law for the proposition that "[a]ny adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax." 490 U.S. at 187. This refusal to resurrect the "long-discarded and thoroughly repudiated doctrine" of intergovernmental tax immunity, *id.* at 187, for on-reservation transactions is even more compelling when the transaction is between a private party and the United States. *Id.* at 175 ("Under current doctrine, however, a State may impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe.").

Congress has not shown an intent to pre-empt every state tax that indirectly impacts a tribe, and none of the statutes that Blaze relies upon purports to do so.[2] While

[2] Blaze fails to cite to the Buy Indian Act, 25 U.S.C. § 47, which it relied upon below, much less rely upon that statute to

the Self-Determination Act seeks to encourage tribes to assume control over services on their own reservations, nothing in the Act demonstrates "that Congress intended to remove all [state-imposed] barriers to profit maximization" with respect to any and all federal contracts. *Cotton Petroleum*, 490 U.S. at 180. As the United States itself has stated, "[n]othing in the [self-determination] regulations suggests an affirmative intent to sweep away every principle of state law that might influence Tribes as they make that choice." Br. for U.S. 27-28.[3]

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defend the judgment below. Because Blaze's ownership by a nonmember Indian is only relevant in the context of the Buy Indian Act, the suggestion by Amici Adson, et al., that this Court overrule its decision in *Colville* that nonmember Indians are to be regarded as non-Indians for state tax purposes is not properly before the Court. Br. for Adson, et al. at 16-18. In any event, it is apparent that Congress has accepted this Court's decision, as evidenced by its failure to change the law, and the Court has no compelling reason to reconsider this nonconstitutional holding.

[3] Although not relevant to any legal issue here, Blaze mistakenly asserts that the State should have objected to Eddie Ward's testimony at the administrative hearing concerning self-determination contracts. Br. for Resp. at 6 n.3 and 31 n.18. The State has never objected to the admissibility of Mr. Ward's testimony, only to Blaze's interpretation of that testimony and the weight to be given to it. Mr. Ward specifically testified that he was not involved in the financing of projects, JA 54-55, so his testimony on this topic is plainly unpersuasive, particularly in light of the official position taken by the United States in its own brief. Br. for U.S. at 23-24. Moreover, his statement that there is no difference between a contract between the BIA and a private contractor, and a contract between a tribe and a private contractor, Br. for Resp. at 10 ("The only difference between the two contracts is 'whose name is on the contract.' "), highlights his unfamiliarity with federal policy as set by Congress. The

Acceptance of Blaze's argument that any state law that affects tribal decision-making must be pre-empted would lead to untenable results. For example, non-Indians employed by a tribe are subject to state income tax, while tribal members who live and work on their own reservations are not. This difference in taxation would, according to Blaze, hinder a tribe's sovereign right to hire employees because the employees subject to state taxation might demand to be paid more, so state taxation of the non-Indian employees must be barred. Similarly, this Court held in *Cotton Petroleum* that a state may impose nondiscriminatory taxes on non-Indians engaged in mineral extraction on a reservation, yet it is clear that a state could not impose the same taxes on a tribe that directly mined its own resources. *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (striking direct tax on tribal royalties). Applying Blaze's argument, the imposition of the state tax on the non-Indian lessee would hinder tribal sovereignty because it might affect the tribe's decision whether to engage in the mining activity or to allow others to do it pursuant to a license or lease. Because the tax might affect tribal decision-making in this manner, the logic of Blaze's argument is that any such state tax would be barred, including, specifically, the taxes that this Court upheld in *Cotton Petroleum*. It is plain that this is not the law, and that any impairment of federal policy "that might be caused by these effects . . . is

---

entire thrust of the Indian Self-Determination Act is Congress' recognition that there *is* a difference between a service administered by the United States and the same service administered by a tribe.

simply too indirect and too insubstantial to support [a] claim of pre-emption." *Cotton Petroleum*, 490 U.S. at 187.

Moreover, Blaze significantly overstates the interests of the tribes in the BIA's road construction activities. The statutes and regulations make it clear that the role of the tribes is advisory and that all final responsibility and authority remains with the United States. *See* 23 U.S.C. § 204; 25 C.F.R. § 170.3 ("[T]he Commissioner shall plan, survey, design and construct roads on the Federal-Aid Indian Road System."); 25 C.F.R. § 170.4a (tribe establishes priorities *subject to approval* of Commissioner); Br. for U.S. at 18-20; Br. of Navajo Nation at 3 ("The Secretary of Transportation must approve the location, type, and design of all projects on the Navajo BIA Road System."). Blaze's core theme is that the tribes have sovereign authority over road construction, but it is plain that the United States – not the tribes – is exercising such authority. Under the Self-Determination Act, each of the tribes had the opportunity to contract with the United States to obtain the funds to exercise sovereign authority over road construction. With regard to the contracts at issue here, none of the tribes did so. No tribe was a party to any of these road contracts. The United States was exercising its own sovereign powers and responsibilities, and no statute evidences any intent to give tax immunity to contractors doing business with the United States merely because an unexercised opportunity exists for a tribe to receive the funds necessary to provide the service directly.[4]

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[4] Blaze argues that congressional intent to pre-empt a state tax can somehow be implied from the provision in the Self-

Blaze's attempt to distinguish between tribal governmental and commercial activities is similarly unpersuasive. Br. for Resp. at 20-24, 26-27. This Court has refused to draw such a line where Congress has not done so. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700, 1703 (1998). Moreover, this Court has held that tribal sovereignty extends to activities traditionally regarded as commercial, so such a distinction fails to account for the realities of tribal government operations. *See Cotton Petroleum*, 490 U.S. at 167-68 (development and taxation of reservation resources); *Cabazon*, 480 U.S. at 216-20 (gaming facility); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (harvesting of reservation timber). Thus, Blaze's attempt to distinguish decisions of this Court upholding state taxes as somehow involving less important tribal interests than those at issue here simply misses the mark. Moreover, from Blaze's point of view the contract was merely a commercial contract. Accordingly, its attempt to claim tax immunity because of speculative and indirect effects upon tribes with whom it did not even contract fails as a matter of law.[5]

Determination Act allowing contracts to be reassumed by the United States. Br. for Resp. 32-33. As noted above, however, this statute does not even regulate the contracts at issue. Moreover, such a remote and speculative possibility "is simply too indirect and too insubstantial to support" Blazes' claim of pre-emption. *Cotton Petroleum*, 490 U.S. at 187.

[5] Blaze's strained analogy to the Foreign Commerce Clause of the United States Constitution, Br. for Resp. at 22-24, actually supports the State here by demonstrating that this Court will not lightly infer congressional intent to pre-empt state taxation in areas that have been especially entrusted to Congress to regulate. In *Barclays Bank* this Court explained that in foreign

Congress has not acted "by plain implication" to bar state taxes on federal contractors doing work on Indian reservations. The fact that such taxes may be a factor that a tribe or the United States considers in making decisions or that state taxes imposed on private parties may increase the costs that the United States incurs is not enough to trigger pre-emption. The same is true of any tax on a federal contractor, whether the contract is being performed on a military base, in a national park, or on an Indian reservation. *See* Br. for U.S. at 29 ("Precisely the same could be said of any state tax that falls upon a federal contractor being paid with federal funds for a particular purpose."). Therefore, the Arizona tax is valid.[6]

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commerce situations "Congress may more passively indicate that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential;' it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce. . . . [and] we discern no 'specific indications of congressional intent' to bar the state action here challenged." 512 U.S. at 323-24 (citations omitted; emphasis by Court). Congress has similarly been given special authority over Indian affairs, and this Court has recognized that congressional intent to bar state taxation will not be inferred lightly and that tax immunity must be granted "either expressly or by *plain* implication." *Cotton Petroleum*, 490 U.S. at 175-76 (emphasis added).

[6] Congress has not acted to bar state taxation of federal contractors doing work on Indian reservations, although the imposition of such taxes is by no means a recent development. *See Blaze Constr. Co. v. Taxation & Revenue Dep't*, 84 P.2d 803 (N.M. 1994) (upholding state tax on road construction for BIA), *cert. denied*, 514 U.S. 1016 (1995); *Arizona Dep't of Revenue v. Hane Const. Co.*, 564 P.2d 932 (Ariz. App. 1977) (upholding state tax on canal construction for BIA); *Matter of State Motor Fuel Tax Liab.*,

B. State Services Are Irrelevant In Determining The Validity Of A Tax On A Nontribal Member Doing Business With The United States.

Blaze argues that this Court's decisions require the State to justify its tax on federal contractors by showing that it provided direct services to the contractor in connection with the project. Br. for Resp. at 39-41. For authority, it relies on cases involving private parties contracting directly with tribes or tribal members, primarily *Bracker* and *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982). These cases, however, are not controlling in situations that do not involve any tribal member or tribal funds. *See* Br. for Pet. at 25-30 (discussing how the key facts in both *Ramah* and *Bracker* were that the taxes would plainly have to be paid from the contractors' receipts of tribal funds and that the controlling federal regulatory scheme directly governed business dealings with the tribes). Blaze fails to reconcile its interpretation of *Bracker* and *Ramah* with this Court's decisions upholding state taxation of nontribal members, particularly *Cotton Petroleum* and *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994).[7] The State's

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273 N.W.2d 737 (S.D. 1978) (upholding state fuel tax on BIA road contractor); *G.M. Shupe, Inc. v. Bureau of Revenue*, 550 P.2d 277 (N.M. App. 1976) (upholding state tax on contractor building a dam for the BIA). If Congress wished to bar state taxation of federal contractors, it certainly could have done so in the recent Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 (1998), especially in light of the New Mexico Supreme Court's 1994 decision upholding a state tax on Blaze's road construction work.

[7] Both Blaze and the court of appeals attempt to distinguish *Cotton Petroleum* by stating that the holding in section III of the

position, on the other hand, reconciles this Court's precedents, *see* Br. for Pet. at 29-30, and presents this Court with an opportunity to establish a rule that is simple in operation and recognizes well-established state jurisdiction over non-Indian transactions, yet does not infringe on Indian tribes' authority over their own members and resources. *See also* Br. for U.S. at 25-26 ("Uniform application of the rule of *New Mexico* to all government contracts would pretermit any such inquiry, and therefore would avoid introducing an additional layer of complexity into cases falling at the intersection between state taxation of federal contractors and state taxation of matters involving Indians.").[8]

Moreover, while Blaze and its *amici* argue that the State has no authority to exercise its sovereign powers on the reservations, they plainly recognize the important

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opinion that there need not be a *quid pro quo* between state services and the activity being taxed is somehow distinct from the discussion in section IV of what services may properly be considered in determining state jurisdiction. Br. of Resp. at 9-40 n.21; Pet. App. 22. This technical reading misses the essential point that this Court made in *Cotton Petroleum*: that the extent of state services is not a legally significant factor when the tax is imposed on a nontribal member and has only indirect effects on tribal interests.

[8] Blaze also notes that some of its road projects are in remote locations. Br. for Resp. at 11-12. The State admitted this in its brief, but also pointed out that many of Blaze's projects connect to or are near state highways. Br. for Pet. at 4. A categorical rule that federal contractors are taxable will avoid a constitutional rule that turns on the distance between a construction project and the reservation boundary.

role state government plays in providing reservation services. The Navajo Nation notes that in the three state area in which the Nation is located, approximately *3,197 miles* of roads – over a third of the total miles of roads – are state and county roads. Br. of Navajo Nation at 8. Similarly, Blaze recognizes that the United States pays Arizona public school districts approximately $84,000,000 per year to support public school education for Indian children. Br. for Resp. at 14.[9] By authorizing these payments, Congress has not only recognized state responsibility and authority to provide services on Indian reservations, but also has actively encouraged them. Congress has not drawn a circle around Indian reservations and commanded states to stay out, but instead has plainly recognized the important and substantial role that state government plays on the reservations.[10]

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[9] Blaze implies that these federal payments somehow reimburse the State for the governmental expenditures that the State cites in its brief. Br. for Resp. at 14-15. That is not correct. All expenditures listed in the State's brief, Br. for Pet. at 5-8, are made from State funds. Federal payments supplement, but do not replace, these funds.

[10] Although the court of appeals' primary error in this case was in using a balancing test, even assuming that approach was valid it is plain that the court below erred by effectively giving no weight to the interest of the State in regulating non-Indian activities within the State. While the court assumed that tribes always have significant interests in on-reservation transactions, even those involving nontribal members, it failed to recognize the State's significant interests in transactions that do not involve tribal members. Similarly, while Blaze and it's *amici* emphasize the geographical component of tribal sovereignty, they ignore the geographical component of state sovereignty and the undisputed fact that each of the taxed transactions took

Business conducted within the State of Arizona, including business conducted with the United States, is taxable unless the imposition of the tax is plainly contrary to federal law. The State does not have to justify its taxes by showing that it provides specific services in connection with the taxed activities. The rule is not different merely because the transaction takes place on an Indian reservation.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' decision.

Respectfully submitted,

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September 1998

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place within the State of Arizona. This Court has reconciled the overlapping sovereignty of states and tribes by holding that "[u]nless and until Congress provides otherwise," states and tribes have "concurrent taxing jurisdiction" over non-members. *Cotton Petroleum*, 490 U.S. at 189. Any suggestion that a geographical component of tribal sovereignty carries particular weight cannot survive this Court's holding in *Cotton*.

No. 97-1536

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARIZONA DEPARTMENT OF REVENUE, PETITIONER

v.

BLAZE CONSTRUCTION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a State may impose a transaction privilege tax on a contractor who enters into contracts with the Bureau of Indian Affairs to construct and improve roads on an Indian reservation.

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INTEREST OF THE UNITED STATES

This case involves the assessment of a tax by the State of Arizona on the gross proceeds respondent received under contracts with the Bureau of Indian Affairs, an agency within the United States Department of the Interior, for construction of roads on Indian reservations in Arizona. The United States has an interest in the principles governing state taxation of contractors doing business with the federal government and state taxation and regulation of the activities of non-Indians on Indian reservations.

STATEMENT

From 1986 through 1990, the Bureau of Indian Affairs (BIA) awarded respondent Blaze Construction Company (Blaze) 19 separate contracts to build and repair roads on six Indian reservations in Arizona. The Arizona Depart-

ment of Revenue subsequently sought to impose a transaction privilege tax on Blaze's gross receipts under the contracts. Blaze contested the applicability of the transaction privilege tax to the contracts, and this litigation ensued. Pet. App. 2-3; J.A. 14-21.

1. a. Federal local roads on Indian reservations are constructed and improved pursuant to the Federal Lands Highways Program. 23 U.S.C. 204, amended by Transportation Equity Act For The 21st Century (Transportation Equity Act), Pub. L. No. 105-178, Tit. I, § 1115(d)(2), 112 Stat. 157 (1998).[1] Under that program, funds for road construction and improvement projects on Indian reservations are appropriated in a lump sum for each fiscal year, and are derived from the federal Highway Trust Fund. See, *e.g.*, Transportation Equity Act, § 1101(a)(8), 112 Stat. 112 (appropriating $225,000,000 from Highway Trust Fund for "Indian reservation road" projects for fiscal year 1998 and $275,000,000 for fiscal years 1999 to 2003). See generally 26 U.S.C. 9503 (establishing Highway Trust Fund and providing for transfer to Fund of sums equivalent to proceeds from various transportation and fuel taxes).

The Secretary of Transportation allocates the funds available for Indian reservation roads "according to the relative needs of the various reservations as jointly identified by the Secretary [of Transportation] and the Secretary of the Interior." 23 U.S.C. 202(d), amended by Transportation Equity Act, § 1115(b), 112 Stat. 154-156 (providing that, beginning in fiscal year 2000, funds "shall be allocated among Indian tribes" on the basis of a formula established by the Secretary of the Interior pursuant to a negotiated rulemaking procedure involving representatives of Tribes).[2] The Secretary of Transportation and the Secretary of the Interior are jointly responsible for performing the necessary planning. 23 U.S.C. 204(a) and (f), amended by Transportation Equity Act, § 1115(d), 112 Stat. 156-157.

By regulation, the Commissioner of Indian Affairs has the responsibility to "plan, survey, design and construct" Indian reservation roads. 25 C.F.R. 170.2(d), 170.2(f), 170.3, 170.4, 170.4a. The Secretary of Transportation must approve the location, type, and design of all projects on the Indian reservation road system before construction may begin, and the construction is under the general supervision of the Secretary of Transportation. 25 C.F.R. 170.4. The Commissioner of Indian Affairs recommends to the

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[1] The Federal Lands Highways Program consists of public lands highways, park roads, parkways, and Indian reservation roads. See 23 U.S.C. 204(a). "Indian reservation roads" are defined as "public roads that are located within or provide access to an Indian reservation or Indian trust land or restricted Indian land which is not subject to fee title alienation without the approval of the Federal Government." 23 U.S.C. 101(a), 204(a). Roads on the Interstate System and the National Highway System that cross through Indian reservations are "federal-aid" highways subject to the different provisions applicable to such highways. See 23 U.S.C. 103(a), 120(f); see generally 23 U.S.C. 101-160.

[2] The funding formula beginning in fiscal year 2000 is to be based on factors that reflect "the relative needs of the Indian tribes, and reservation or tribal communities, for transportation assistance," and "the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each Bureau of Indian Affairs area, geographic isolation and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources." 23 U.S.C. 204(d)(2)(D), as added by Transportation Equity Act, § 1115(b)(4), 112 Stat. 155. At present, relative need is determined based on tribal population, tribal vehicle use, and the cost of improving roads. Federal Highway Administration, Department of Transportation & Bureau of Indian Affairs, Department of Interior, *Indian Reservation Roads Program Stewardship Plan* 4 (July 1996). In earlier years, relative need was determined based upon tribal population, reservation size, and reservation road mileage. *Ibid.*

Tribe concerned those proposed road projects for which there is the greatest need, as determined by a "comprehensive transportation analysis." 25 C.F.R. 170.4a. The Tribe then establishes its "annual priorities for road construction projects," and, subject to the approval of the Commissioner and the availability of appropriated funds, selects the projects to be performed. *Ibid.*; see also 23 U.S.C. 204(j), discussed in note 3, *infra*. The granting of any necessary right-of-way across lands held by the United States in trust for the Tribe or by individual Indians is governed by 25 C.F.R. Pt. 169 (see 25 C.F.R. 170.5(a)) and requires the consent of the Tribe or (with certain exceptions) the individual Indians. See 25 U.S.C. 323, 324; 25 C.F.R. 169.3.

b. Unless the Secretary of the Interior determines that another method is in the public interest, construction projects on Indian reservation roads under the Federal Lands Highways Program are undertaken pursuant to contracts awarded by competitive bidding. 23 U.S.C. 204(e). Construction and improvement projects on Indian reservation roads are, however, subject to the provisions of Section 23 of the Buy Indian Act of 1910, 25 U.S.C. 47 ("Indian labor shall be employed" "[s]o far as may be practical") and Section 7(b) of the Indian Self-Determination and Education Assistance Act (Self-Determination Act), 25 U.S.C. 450e(b) (contracts or subcontracts, to the greatest extent feasible, shall give preference to Indians for employment opportunities and to Indian organizations or Indian-owned enterprises for subcontracting awards). 23 U.S.C. 204(e).

Indian reservation roads constructed with federal funds under the Federal Lands Highways Program are open to the public. 23 U.S.C. 101(a) (definitions of "Indian reservation roads" and "public road"); 25 C.F.R. 170.8(a). Such

roads are generally maintained either by the Tribe or by the Commissioner of Indian Affairs. 25 C.F.R. 170.6.

c. Pursuant to the Self-Determination Act, a tribal organization may, if it chooses, enter into a contract with the Department of the Interior pursuant to which the tribal organization receives federal funds and assumes from the Department the responsibility "to plan, conduct, and administer [departmental] programs or portions thereof, including construction programs." 25 U.S.C. 450f(a)(1), 450j-1; 25 C.F.R. 900.3(b)(4).[3] A tribal organization may assume a variety of functions under a self-determination contract, including providing or subcontracting for the services of architects and other consultants to design projects, and of construction contractors to complete projects, 25 C.F.R. 900.130(b)(1), (c)(1) and (c)(3); administering and disbursing funds, 25 C.F.R. 900.130(b)(2) and (c)(2); directing and monitoring the work of architects, engineers, consultants, contractors, and subcontractors, 25 C.F.R. 900.130(b)(3) and (c)(4); and managing "day-to-day activities of the contract," 25 C.F.R. 900.130(c)(5). The Secretary of the Interior is responsible for overseeing the

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[3] See also 23 U.S.C. 204(j), amended by Transportation Equity Act, § 1115(d)(6), 112 Stat. 157 (up to two percent of funds made available for Indian reservation roads for each fiscal year shall be allocated to those tribal governments applying for transportation planning pursuant to the Self-Determination Act; the tribal government, in cooperation with the Secretary of the Interior and, as appropriate, a state, local, or metropolitan planning organization, shall develop a transportation improvement program that includes all projects proposed for funding; and projects shall be selected by the tribal government from the program, subject to approval by the Secretary of the Interior and the Secretary of Transportation); 23 U.S.C. 204(b), as amended by Transportation Equity Act, § 1115(d)(2), 112 Stat. 157 ("[T]he Secretary [of Transportation] and the Secretary of the appropriate Federal land management agency may enter into construction contracts and other appropriate contracts with a State or civil subdivision of a State or Indian tribe.").

performance of tribal organizations that have entered into self-determination contracts to perform departmental functions. 25 C.F.R. 900.131.

2. a. From 1986 through 1990, the BIA awarded respondent Blaze Construction Company 19 separate contracts to build and repair Indian reservation roads on the Navajo, Hopi, Fort Apache, Colorado River, Tohono O'Odham, and San Carlos Apache Indian Reservations in Arizona. Pet. App. 2-3; J.A. 14-21. Blaze, which works exclusively on construction projects on Indian reservations, is an Indian-owned company incorporated under the laws of the Blackfeet Tribe of Montana. J.A. 12. It is not licensed by the State of Arizona, and maintains no off-reservation facilities in Arizona. J.A. 12-13.

The State did not participate in the planning of any of Blaze's projects, and issued no permits relating to those projects. Pet. App. 4; J.A. 21. Nor did the State conduct inspections or provide any other specific services in connection with the projects. Pet. App. 4. Blaze used State roads to transport equipment between reservations and to attend pre-construction meetings at the BIA's offices in Phoenix. *Ibid.* Blaze paid fees relating to its use of Arizona's highways, including motor vehicle registration fees, motor carrier taxes, and use fuel taxes. *Ibid.* The State does not maintain the roads that were constructed and improved by Blaze pursuant to the contracts at issue. Pet. App. 4-5; J.A. 21.

b. In 1990, the Arizona Department of Revenue (ADOR) issued a tax deficiency assessment against Blaze in the amount of $1,200,581.54. J.A. 11-12. In the assessment, ADOR sought to collect transaction privilege taxes based on Blaze's gross receipts under the construction

projects Blaze had performed for the BIA. J.A. 12.[4] Arizona's transaction privilege tax is levied on the privilege or right to engage in business in the State, measured by the gross volume of business activity conducted within the State. Ariz. Rev. Stat. Ann. § 42-1306 (West 1991). A "prime contractor" is taxed based on sixty-five percent of its gross proceeds, subject to certain deductions. *Id.* § 42-1310.16. The tax rate applicable to a prime contractor is five percent. *Id.* § 42-1317(A)(1)(h).

After unsuccessfully challenging the assessment in administrative proceedings before ADOR, Blaze appealed to the Arizona Board of Tax Appeals, which held that federal law preempted application of the transaction privilege tax to Blaze. J.A. 5-10. ADOR filed a refund action in the Arizona Tax Court, which granted summary judgment to ADOR. Pet. App. 28-29. Blaze appealed to the Arizona Court of Appeals, which reversed, holding that federal law preempted application of Arizona's transaction privilege tax to Blaze's proceeds from contracts with the BIA to build Indian reservation roads. *Id.* at 1-26. The Arizona Supreme Court denied the State of Arizona's petition for review on December 16, 1997. *Id.* at 27.

SUMMARY OF ARGUMENT

I. Federal law does not preclude Arizona from imposing its transaction privilege tax upon the gross receipts that respondent, Blaze Construction Company, received under its contracts with the Bureau of Indian Affairs to construct and improve roads on Indian reservations lo-

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[4] ADOR also sought to collect transaction privilege taxes relating to contracts Blaze entered into with tribal housing authorities. J.A. 12. ADOR subsequently agreed, however, "that the receipts from these projects are not subject to the Arizona privilege tax." See Plaintiff's Statement of Facts in Support of Motion for Summary Judgment, Exh. B, at 1. See also note 16, *infra*.

cated within the State. States may impose nondiscriminatory taxes on federal contractors unless the contractors have been "incorporated into the government structure," or unless federal law expressly precludes the tax in question. *United States* v. *New Mexico*, 455 U.S. 720, 737 (1982).

That rule is fully applicable to state taxes imposed upon federal contractors working on Indian reservations. In cases involving state efforts to tax non-Indians engaging in direct dealings with Tribes or tribal members on a reservation, this Court has determined whether federal law preempted the state tax by conducting a "particularized examination of the relevant state, federal, and tribal interests." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176 (1989) (quoting *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982)). The Court has not, however, previously applied that approach to state taxes imposed upon non-tribal contractors whose contract is with an agency of the United States rather than a Tribe. For four principal reasons, the legality of such state taxes is properly determined under the rule of *United States* v. *New Mexico*, rather than under the approach the Court has applied to state taxes "when a tribe undertakes an enterprise under the authority of federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

First, state taxes upon federal contractors will not unduly interfere with tribal sovereignty. When the United States is the contracting party, tribal involvement in the making and performance of the contract will be far less substantial than in cases in which a tribal entity is a party to the contract. Second, state taxes imposed upon non-tribal parties who contract with agencies of the United States will generally have an uncertain and indirect effect on tribal interests, because the ultimate effect of such

taxes will depend on the federal agencies' response to the taxes. Third, state taxes on contractors whose contract is with the United States do not implicate the distinctive concerns that arise when a State attempts to enter into the "comprehensively regulated" area of direct relations between Indians and non-Indians. *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980). Fourth, the conclusion that *United States* v. *New Mexico* applies to all federal contracts, even those bearing some relation to Indian matters, also has the virtue of simplicity. A different approach would require the courts to determine the point at which the connection of a contract to Indian matters was sufficient to displace the rule of *United States* v. *New Mexico*.

II. The state tax at issue here does not unduly interfere with important federal policies. Neither the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, nor the Buy Indian Act of 1910, § 23, 25 U.S.C. 47, reflects a federal policy that is impeded by Arizona's tax. And although imposition of Arizona's tax increases the costs of federal contracting, *United States* v. *New Mexico* makes clear that a state tax is not preempted by federal law simply because the burden of the tax will ultimately fall on the United States.

ARGUMENT

ARIZONA IS NOT BARRED BY FEDERAL LAW FROM ASSESSING ITS TRANSACTION PRIVILEGE TAX AGAINST THE GROSS PROCEEDS RESPONDENT RECEIVES UNDER ITS CONTRACTS WITH THE BUREAU OF INDIAN AFFAIRS

This case involves the State of Arizona's transaction privilege tax, which the State imposes upon persons who engage in business in the State. Ariz. Rev. Stat. § 42-

1306(A) (West 1991). The issue is whether federal law precludes Arizona from imposing that tax upon Blaze's gross receipts under its contracts with the BIA to construct and improve roads on Indian reservations located within the State.

I. A NON-TRIBAL MEMBER'S CONSTRUCTION CONTRACTS WITH THE BUREAU OF INDIAN AFFAIRS ARE SUBJECT TO THE GENERAL RULE OF *UNITED STATES* v. *NEW MEXICO* THAT A STATE MAY TAX THE PROCEEDS RECEIVED BY A CONTRACTOR UNDER A CONTRACT WITH A FEDERAL AGENCY

A. *United States* v. *New Mexico* Establishes A General Rule That A State May Tax A Federal Contractor

States are generally free to impose nondiscriminatory taxes upon federal contractors. *United States* v. *New Mexico*, 455 U.S. 720 (1982). In *New Mexico*, the State sought to impose a gross receipts tax and a use tax on three companies that provided management and construction services to atomic laboratories operated in the State by the Atomic Energy Commission. *Id.* at 722-723. The taxes were legally incident upon the contractors, but the United States was contractually obligated to reimburse the contractors for their costs, including the taxes at issue. *Id.* at 723, 738. The United States contested the legality of the taxes, arguing that its immunity from state taxation precluded New Mexico from imposing its taxes upon certain of the operations of the federal contractors. *Id.* at 728.

This Court disagreed. Acknowledging the "confusing nature" of its prior decisions concerning the scope of the federal government's immunity from state taxation, the Court reiterated the basic principle that "a State may not, consistent with the Supremacy Clause, lay a tax 'directly

upon the United States.'" *New Mexico*, 455 U.S. at 733 (citation omitted; quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943)). Conversely, the Court held, immunity from state taxation is not conferred "simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *Id.* at 734. Rather, a conclusion that the Constitution itself confers "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. The Court further noted that Congress could grant broader immunity to federal contractors, by "so expressly providing." *Id.* at 737. Because Congress had not so provided, and because the contractors in question were not so closely connected to the federal government as to have been "incorporated into the government structure," the Court upheld New Mexico's taxes. *Id.* at 737, 738-744.

Under the rule announced in *New Mexico*, Arizona is entitled to enforce its transaction privilege tax against Blaze. The transaction privilege tax is legally incident upon Blaze, not the BIA. *Tower Plaza Invs. Ltd.* v. *DeWitt*, 508 P.2d 324, 326 (Ariz. 1973), appeal dismissed, 414 U.S. 1118 (1974); *Arizona Dep't of Revenue* v. *Hane Constr. Co.*, 564 P.2d 932, 934 (Ariz. Ct. App. 1977). There is no suggestion that any provision of federal law expressly provides Blaze with immunity from state taxation with respect to its contracts with the BIA. Blaze's relationship to the BIA, moreover, is simply that of a typical government contractor, and Blaze therefore cannot be said to have been "incorporated into the government structure" in a way that would confer tax immunity. *New Mexico*, 455 U.S. at 737.

B. There Is No General Exception To The Rule Of *United States* v. *New Mexico* For A Non-Tribal Member's Contracts With The Bureau Of Indian Affairs To Construct Roads On Indian Reservations

The Arizona Court of Appeals held that the rule established by this Court's decision in *New Mexico* is inapplicable to the present case, because the BIA's contracts with Blaze involved construction on Indian reservations. Pet. App. 5-9. In that context, the court held, the State's ability to impose its transaction privilege tax turns on application of "the implied preemption analysis that the United States Supreme Court has repeatedly applied to assertions of state authority over the activities of non-Indians on Indian reservations." Pet. App. 5. In our view, however, neither the location of the construction work nor the ultimate purpose of the federal government's expenditures—here, the furnishing of public roads to serve reservation communities—renders the general rule of *New Mexico* inapplicable.[5]

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[5] If the BIA entered into a contract with a tribal entity or member to perform work on the tribal reservation, the contractor would not be subject to the state tax. In such a case, the transaction privilege tax would be legally incident "on an Indian tribe or its members inside Indian country." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458 (1995). "If the legal incidence of [a tax] rests on a tribe or on tribal members for [activity conducted] inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459.

Although Blaze is an Indian-owned company incorporated under the laws of the Blackfeet Tribe of Montana, it has properly conceded that, for purposes of state taxation, it should be treated as a non-Indian contractor with respect to work that it performs on the reservations of other Tribes. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-161 (1980) (for purposes of state taxation, Indians residing on reservation of different tribe "stand on the same footing as non-Indians resident on the reservation"); Resp. Br. in Opp. 2

1. a. This Court has on many occasions considered the question whether federal law permitted a State to impose a given tax upon non-Indians engaging in direct dealings with a Tribe or tribal members on a reservation. Although the Court's approach to that question "has varied over the course of the last century," the Court now treats the question as one of federal preemption. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 173, 176-177 (1989). The Court has emphasized, however, that "questions of pre-emption in [that] area are not resolved by reference to standards of pre-emption that have developed in other areas of law." *Id.* at 176. Rather, the preemption analysis in that setting turns on "a particularized examination of the relevant state, federal, and tribal interests." *Ibid.* (quoting *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982)). Specifically, "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); accord *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Cf. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 459 (1995) ("But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy.").

Although the preemption inquiry in cases involving state taxes affecting the relations between the Tribes or

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n.1. See also *Duro* v. *Reina*, 495 U.S. 676, 686 (1990) ("Exemption from state taxation for residents of a reservation * * * is determined by tribal membership, not by reference to Indians as a general class.").

individual Indians and non-Indians on a reservation is "sensitive to the particular facts and legislation involved," *Cotton Petroleum*, 490 U.S. at 176, it is also informed by certain fundamental principles of general applicability in such cases.

First, "'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.' Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a 'historic immunity from state and local control.'" *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 332 (citation omitted; quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975), and *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973)). That history of tribal sovereignty "serves as a necessary 'backdrop'" to the preemption analysis. *Cotton Petroleum*, 490 U.S. at 176.

Second,

> both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. * * * Congress' objective of furthering tribal self-government * * * includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." * * * * Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.

New Mexico v. *Mescalero Apache Tribe*, 462 U.S. at 334-336 (footnote omitted; quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)). Cf. *Cotton Petroleum*, 490 U.S. at 176 ("[I]n examining the pre-emptive force of the relevant federal legislation, we are cognizant of * * * the broad policies that underlie the legislation.").

Third, State assertions of authority over direct commercial relations between Indians and non-Indians must be viewed from the perspective that "[t]hroughout this Nation's history, Congress has authorized 'sweeping' and 'comprehensive federal regulation' over persons who wish to trade with Indians and Indian tribes, * * * [in the] exercise of Congress' power to 'regulate Commerce . . . with the Indian Tribes,' see U.S. Const., Art. I, § 8, cl. 3." *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61, 70 (1994). See also *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980) ("In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them.").[6]

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[6] The Articles of Confederation granted Congress "the sole and exclusive right and power of regulating * * * the trade and management of all affairs with the Indians," but that grant of authority excepted Indians who were "members of any of the states," and it was subject to a proviso "that the legislative right of any state, within its own limits, be not infringed or violated." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 573 (1831) (M'Lean, J., concurring). The attempt in the proviso to afford the States some authority along with the power of the federal government proved unsatisfactory, because the proviso was invoked by Georgia and North Carolina to treat with the Indians regarding their land and other objects, and thereby "to annul the power itself." *Id.* at 559. Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

The relations between Indians and non-Indians are now often governed by federal statutes, Executive Orders, and regulations adopted pursuant to the Indian Commerce Clause or other federal authority (see *Williams* v. *Lee*, 358 U.S. 217, 220 n.4 (1959), citing *United States* v. *Kagama*, 118 U.S. 375 (1889)), that overlay the sovereignty of the Tribes within their reservations. The preemption analysis under such provisions, however, is informed by the realization that each new

Fourth, "[d]oubtful expressions are to be resolved in favor of the [Indians,] who are * * * dependent upon [the Nation's] protection and good faith." *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 174 (1973) (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930)). "As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." *Ramah Navajo School Bd.*, 458 U.S. at 838. See also *Cotton Petroleum*, 490 U.S. at 176-177 ("federal pre-emption is not limited to cases in which Congress has expressly—as compared to impliedly—pre-empted the state activity"; "ambiguities in federal law are, as a rule, resolved in favor of tribal independence").

Finally, "[t]he exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336. See also *Cotton Petroleum*, 490 U.S. at 185-186 (in upholding state severance tax on non-Indian oil and gas producer whose operations were located on reservation, Court emphasizes that State provided services to producer's operations and regulated operations on reservation; "This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it.").

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federal enactment typically assumes and builds upon the sovereign status and powers of the Indian Tribes, as they have been preserved by the practices and commitments of prior generations, and upon the constitutionally based assumption of control over Indian affairs by the national government, rather than the States. See, *e.g.*, *Mazurie*, 419 U.S. at 556-557; *Williams* v. *Lee*, 358 U.S. at 220. That history is the basis for the "backdrop" of tribal sovereignty and self-governance in the preemption inquiry in cases involving relations between a Tribe or its members on the one hand and nonmembers on the other.

2. The Court has applied that preemption analysis to a wide variety of state taxes imposed on non-Indians "doing business with Indian tribes" or tribal members on an Indian reservation. *Cotton Petroleum*, 490 U.S. at 176.[7] The Court has also applied that analysis to determine whether federal law preempted other assertions of state authority over interactions between Indians and non-Indians on an Indian reservation. See, *e.g.*, *Cabazon Band of Mission Indians*, 480 U.S. at 216-220 (State may not regulate gaming activities of non-Indians in tribal gaming operation); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 328-344 (State could not apply game laws to non-Indians hunting and fishing on tribal lands on reservation). The Court has not, however, previously applied that preemption framework in the circumstances presented by this case, *i.e.*, to a state tax imposed on a non-tribal contractor whose contract is with an agency of the United States it-

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[7] See, *e.g.*, *Milhelm Attea & Bros.*, 512 U.S. at 73-78 (upholding state regulations designed to enforce taxes on sales of cigarettes to non-Indians on reservation); *Cotton Petroleum*, 490 U.S. at 176-187 (upholding state severance tax on non-Indian oil and gas producer conducting operations pursuant to lease with Tribe, where State regulated on-reservation activity and provided services to producer's operations, and where effect of tax was "indirect" and "insubstantial"); *Ramah Navajo School Bd.*, 458 U.S. at 836-847 (State could not impose gross receipts tax on non-Indian contractor's construction of tribal school on reservation pursuant to contract with tribal school board, where federal regulatory scheme was comprehensive, tax would interfere with federal and tribal interests underlying regulatory scheme, and State was unable to justify tax except in terms of general interest in raising revenue); *Central Machinery*, 448 U.S. at 163-166 (State could not impose transaction privilege tax on non-Indian company's on-reservation sale of farm equipment to tribal enterprise); *White Mountain Apache Tribe*, 448 U.S. at 141-153 (same, as to motor carrier license and use fuel tax imposed by State upon non-Indian logging company with respect to logging company's activities on BIA and tribal roads pursuant to contracts with Tribe for harvesting of timber from tribal trust lands).

self, rather than with a Tribe or tribal entity. For four principal reasons, the question whether federal law prohibits such state taxes is properly governed by the approach taken in *United States* v. *New Mexico*, rather than by the approach the Court has applied to state taxes "when a *tribe* undertakes an enterprise under the authority of federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336 (emphasis added). Accord *Blaze Constr. Co.* v. *Taxation & Revenue Dep't*, 884 P.2d 803, 806 (N.M. 1994) (in case involving Blaze's contracts with BIA to construct roads on Indian reservations in New Mexico, court holds that "[b]ecause Blaze * * * contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable, and Blaze * * * [is] subject to state taxes, just as any other federal government contractor would be"), cert. denied, 514 U.S. 1016 (1995).

a. State taxes imposed on non-tribal parties to contracts with agencies of the United States do not unduly interfere with tribal sovereignty. When the United States is the contracting party, tribal involvement in fashioning the contract, and in managing the performance of the non-tribal party under the contract, typically is both less direct and far less substantial than in cases in which a tribal entity is a party to the contract.

For example, when the BIA enters into contracts with non-tribal companies to construct or improve Indian reservation roads, tribal involvement is primarily consultative. See Transportation Equity Act, § 1115(b)(4), 112 Stat. 154-155 (to be codified at 23 U.S.C. 202(d)(2)) (beginning in year 2000, funds appropriated for Indian reservation roads shall be allocated among Tribes using formula established by committee including Indian representatives);[8] 25 C.F.R. 170.4a (after BIA plans and designs road projects, and recommends projects to Tribe based on needs, Tribe establishes annual priorities for projects, subject to approval by Commissioner of Indian Affairs).[9] It is the BIA, not the Tribe, that exercises authority over the contracting and construction process. See generally 23 U.S.C. 203, 204.

By contrast, the role played by the Tribe is far greater when the Tribe itself enters into a construction contract or other contract with a non-Indian to furnish goods or services on the reservation, as the Tribe may do if it assumes responsibility for governmental programs under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* In that Act, Congress declared its commitment to the "establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. 450a(b).

As part of that commitment, the Self-Determination Act requires that the Secretary of the Interior, "upon the request of any Indian tribe by tribal resolution, * * * enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction pro-

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[8] During the years when the construction at issue in the present case was planned and completed, the allocation of appropriated funds among Tribes was determined based on need criteria developed jointly by the Secretary of Transportation and the Secretary of the Interior. 23 U.S.C. 202(e) (1988). See also note 2, *supra*.

[9] If the project requires the granting of a right-of-way across Indian lands, the consent of the Tribe or individual owner is required. See page 4, *supra*.

grams." 25 U.S.C. 450f(a)(1). In other words, the Self-Determination Act permits tribal organizations to receive federal funds and use them to assume responsibility for programs that otherwise would have been administered by the Department of the Interior. See, *e.g.*, 25 C.F.R. 900.3(b)(4) ("When an Indian tribe [enters into a self-determination] contract[], there is a transfer of responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs * * *. The contracting tribe thereby accepts the responsibility and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs.").[10]

Although the Secretary of the Interior retains significant oversight responsibility under the Self-Determination Act, see, *e.g.*, 25 C.F.R. 900.131, the Act provides Tribes with a considerable opportunity to exercise their inherent right of self-government and sovereignty over their reservations, and to further self-determination and economic development.[11] State taxes on contracts that a Tribe or tribal organization itself enters into, whether

[10] When a tribal organization assumes responsibility for a program under a self-determination contract, its role will depend on the nature of the self-determination contract. See generally 25 C.F.R. 900.130. If the tribal organization chooses, its role can be quite extensive, and can include providing or subcontracting for the services of architects and other consultants to design projects, and of construction contractors to complete projects, 25 C.F.R. 900.130(b)(1), (c)(1) and (c)(3); administering and disbursing funds, 25 C.F.R. 900.130(b)(2) and (c)(2); directing and monitoring the work of architects, engineers, consultants, contractors, and subcontractors, 25 C.F.R. 900.130(b)(3) and (c)(4); and managing "day-to-day activities of the contract," 25 C.F.R. 900.130(c)(5).

[11] See also, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336-338 (regulation of non-Indian hunting and fishing on reservation as part of economic development project).

pursuant to the Self-Determination Act or otherwise, thus necessarily present a significant risk of interference with tribal sovereignty and self-determination. It is therefore entirely appropriate that such state taxes be scrutinized under the preemption analysis that this Court has applied in that setting, and in comparable settings in which a State attempted to tax the non-Indian party to a contract entered into by a tribal organization "undertak[ing] an enterprise under the authority of federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336. See *Ramah Navajo School Bd.*, 458 U.S. at 834-847 (state tax imposed upon gross receipts of non-Indian contractor selected by tribal school board pursuant to Self-Determination Act).[12]

When a State seeks to tax a non-tribal party to a contract with an agency of the United States, however, any effect on tribal sovereignty and self-government will be substantially attenuated. In that setting, it is appropriate to apply the bright-line rule adopted by this Court in *New Mexico*: States may impose taxes on contractors doing business with the United States unless the contractors have been "incorporated into the government structure," or unless Congress has foreclosed state taxation. 455 U.S. at 737.

b. When a state tax is imposed on non-tribal parties who contract with agencies of the United States, the ef-

[12] See also, *e.g.*, *Cotton Petroleum*, 490 U.S. at 166-187 (state severance tax imposed on non-Indian lessee's production of oil and gas on reservation pursuant to lease with Tribe under Indian Mineral Leasing Act, 25 U.S.C. 396a *et seq.*); *Central Machinery*, 448 U.S. at 161-166 (state transaction privilege tax imposed on non-Indian company's on-reservation sale of farm equipment to tribal enterprise); *White Mountain Apache Tribe*, 448 U.S. at 138-153 (state motor carrier license and use fuel taxes imposed upon non-Indian logging company conducting timber operations on reservation pursuant to contract with tribal enterprise).

fect of the tax on tribal economic interests generally will be uncertain and indirect, and necessarily will be derivative of the effect of the tax on the United States. This case illustrates the point. Although the state taxes in the present case are legally incident upon Blaze, the contracts apparently provided that Blaze's contract price included all applicable state taxes. J.A. 33. This Court's cases appropriately reflect an awareness of the economic reality that such taxes are passed on to the contracting party. See *Ramah Navajo School Bd.*, 458 U.S. at 844 (although gross receipts tax was legally incident upon non-Indian contractor, "ultimate burden [of tax] falls on the tribal organization"). Cf. *White Mountain Apache Tribe*, 448 U.S. at 151 & n.15 (although motor carrier license and use fuel taxes were legally incident upon non-Indian contractor, "the economic burden of the taxes will ultimately fall on the Tribe").[13] When the contracting party is a tribal entity, as in *Ramah Navajo School Board* and *White Mountain Apache Tribe*, such taxes have a direct effect on activities conducted and funds disbursed by the tribal entity.

[13] There is no suggestion that the contracts at issue in the present case contained a separate line item reflecting specific state taxes, and it is apparently unclear what assumption Blaze made as to the applicability of the Arizona transaction privilege tax when submitting its bids. It is therefore also unclear whether the costs of the tax were in fact passed along to the BIA by Blaze. Nor is there any indication that Blaze would be obliged to reduce its contract price or otherwise reimburse the BIA if Blaze were to prevail in the present case. Compare *Ramah Navajo School Bd.*, 458 U.S. at 835 (non-Indian contractor "included the state gross receipts tax as a cost of construction in [its] bid[ ]," paid tax under protest, and agreed that tribal school board would receive any refund); *Central Machinery*, 448 U.S. at 162 (non-Indian seller included transaction privilege tax as separate item when specifying price of farm equipment); *White Mountain Apache Tribe*, 448 U.S. at 140 (non-Indian contractor paid motor carrier license and use fuel taxes under protest, and Tribe agreed to reimburse contractor for any tax liability).

Of course, the validity of a state tax on contractors doing business with a Tribe on a reservation does not turn on proof of the precise effect

In contrast, when the contracting party is a federal agency, as in the present case, it is the agency rather than a tribal entity to which the taxes would be passed on. In such circumstances, the ultimate effect of the taxes on tribal interests would depend in the first instance on the federal agency's response when the costs of the taxes were passed along to it. Because a third party stands between the Tribe and the contractor upon whom the tax is legally incident, any effect of the taxes on tribal interests would be both indirect and less certain.[14] That difference

of the state tax with respect to the particular transactions involved in the case. Rather, the inquiry is broader in scope, and focuses on the extent to which the tax "interferes or is incompatible with federal and tribal interests reflected in federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 334. With respect to the latter question, once it becomes clear that a given tax can be imposed upon contractors, the tax presumably will be passed along to the party purchasing services from the contractors. Thus, if this case involved contracts between a Tribe and Blaze, the validity of Arizona's transaction privilege tax would properly be analyzed on the premise that the costs of the tax would generally be passed on to the Tribe.

[14] In a hearing before the Arizona Department of Revenue, a contracting officer for the BIA testified about the effect of Arizona's transaction privilege tax, as applied to contracts entered into between the BIA and a road-construction contractor. J.A. 24, 33. According to the witness, a five percent state tax would result in "5% fewer roads." J.A. 33. The witness, however, did not explain in any detail the basis for that conclusion. For example, the witness did not indicate whether the BIA would have authority to consider the incidence of state taxation as it allocates highway funds among Tribes. See generally Transportation Equity Act, § 1115(b)(4), 112 Stat. 154-155 (to be codified at 23 U.S.C. 202(d)(2)) (beginning in fiscal year 2000, funds appropriated for Indian reservation roads shall be allocated among Tribes using formula established by committee including Indian representatives; formula

strongly supports the conclusion that the present case should be analyzed under the approach the Court generally applies to state taxes imposed on federal contractors, rather than the approach the Court has applied to state taxes imposed on parties dealing directly with a Tribe or tribal members on a reservation.

c. When a State seeks to tax a contractor whose contract is with a federal agency rather than with a Tribe or individual Indian, the tax necessarily does not implicate the distinctive concerns that historically arise when a State ventures into the "comprehensively regulated" area of direct commercial relations between Indians and non-Indians. *Central Machinery*, 448 U.S. at 163; see pages 15-16 & note 6, *supra*. Rather, the concern raised by state taxation of federal contractors performing services intended to benefit Indians is the same concern raised by state taxation of federal contractors in any other context: such taxes are passed through to the United States, and therefore increase the federal government's contracting costs. This Court's decision in *United States* v. *New Mexico*, however, makes clear that the latter concern does not, in itself, provide an adequate basis upon which to

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shall be based in part on "cost of road construction in each Bureau of Indian Affairs area"); 23 U.S.C. 202 (authorizing Secretary of Interior and Secretary of Transportation to allocate funds for Indian reservations roads based on need); note 2, *supra* (discussing criteria for allocation under 23 U.S.C. 202).

More generally, although the tax at issue in the present case presumably will be passed on by contractors to the BIA, it is much less certain how the BIA would subsequently respond, and how tribal interests would ultimately be affected. In cases such as *Ramah Navajo School Board*, by contrast, the tax at issue was doubtless passed along to the tribal entity that was the other party to the contract, and it was less certain whether other actions of the federal government might have operated to mitigate the impact of the tax. See 458 U.S. at 842 n.6.

invalidate state taxation. 455 U.S. at 734 ("Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy.").

d. For the foregoing reasons, when a State seeks to impose a tax on a non-tribal contractor doing business with the United States, the rule established by this Court's decision in *New Mexico* properly applies: Whether or not the taxed contract bears some relation to Indian matters, nondiscriminatory state taxes upon federal contractors are not preempted by federal law unless the contractor has been "incorporated into the government structure" or Congress has foreclosed state taxation. 455 U.S. at 737. That approach also has the virtue of simplicity. A different approach, in contrast, would require the courts to establish the point at which the connection of a federal contract to Indian matters is sufficient to displace the rule of *New Mexico*. A number of possibilities suggest themselves. For example, (1) it might suffice that the contract at issue was intended to provide benefits to Indians, in which case *New Mexico* would be inapplicable to a contract between the BIA and a private contractor for the construction of an off-reservation BIA office; (2) it might suffice that the contract at issue involved acts to be performed on an Indian reservation, in which case *New Mexico* would be inapplicable to a contract between the Department of Transportation and a non-tribal contractor for the construction of part of an interstate highway that happened to cross a reservation; or (3) it might be necessary for the contract to have both of the foregoing features, as do the contracts in the present case. Uniform application of the rule of *New Mexico* to all government contracts would pretermit any such inquiry, and therefore would avoid introducing an additional layer of complexity into

cases falling at the intersection between state taxation of federal contractors and state taxation of matters involving Indians.

II. THE OTHER GROUNDS FOR PREEMPTION ASSERTED BY RESPONDENT IN THE COURT OF APPEALS ARE WITHOUT MERIT

In the court of appeals, Blaze contended that Arizona's transaction privilege tax interferes with "three distinct federal policies." Pet. App. 12. Blaze did not contend, however, that any provision of federal law expressly provides that Arizona may not impose its transaction privilege tax in the circumstances of the present case. Under the rule of *New Mexico*, Blaze's contention is necessarily unavailing. 455 U.S. at 737. In any event, Blaze's claims of interference with federal policies are exaggerated.

A. There is no merit to Blaze's contention (Pet. App. 12-13, 15) that permitting Arizona to impose its transaction privilege tax on Blaze's contracts with the BIA would offend principles reflected in regulations implementing the Self-Determination Act. See 25 C.F.R. 271.4(d) and (e) (1996).[15] According to Blaze, the cited regulations "express a federal policy in favor of leaving entirely to Indian tribes, free of sanction, the decision whether to apply for

[15] The cited provisions were in effect at the time of the contracts at issue in the present case, see, *e.g.*, 25 C.F.R. 271.4 (1986), but were eliminated in 1996 as unnecessary in light of new regulations promulgated to implement the Self-Determination Act. See 61 Fed. Reg. 49,059, 49,059-49,060 (1996) (new regulations codified at 25 C.F.R. Pt. 900 (1997)). In pertinent part, 25 C.F.R. 271.4(d) (1986) provided that "it is the policy of the [BIA] to leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts." Section 271.4(e) (1986) provided in pertinent part that "[i]t is the policy of the [BIA] not to impose sanctions on Indian tribes with regard to contracting or not contracting."

contracts with the BIA to plan, conduct or administer BIA programs." Pet. App. 13. Moreover, Blaze argued (*ibid.*), permitting state taxation of contractors who contract with the BIA, but precluding such taxation as to contracts entered into by a Tribe,[16] would interfere with that federal policy, by pressuring Tribes to enter into self-determination contracts in order to avoid the effect of state taxation on the availability of federal funds to perform the services in question.

Blaze reads far more into the cited regulations than can reasonably be found there. The regulations simply reflect the BIA's then-current policy of not itself attempting to influence Tribes' decisions as to whether to enter into self-determination contracts.[17] Nothing in the regulations

[16] As the court of appeals indicated (Pet. App. 18), the Arizona Department of Revenue conceded that it could not have taxed the contracts at issue if they had been entered into by a tribal entity. See Plaintiff's Statement of Facts in Support of Motion for Summary Judgment, Exh. B, at 1 (Arizona Department of Revenue originally sought to collect tax with respect to other contracts Blaze entered into with tribal housing authorities, but subsequently "agree[d] that the receipts from these projects are not subject to the Arizona privilege tax"). See also Arizona Transaction Privilege Tax Ruling 95-11 (Arizona Tax Ruling), at 3 (Ariz. Dep't of Revenue Apr. 21, 1995), Ariz. St. Tax Rep. (CCH) ¶ 300-192 ("The gross proceeds derived from construction projects performed on Indian reservations by non-affiliated Indian or non-Indian prime contractors are not subject to the imposition of Arizona transaction privilege tax under the following conditions: 1. The activity is performed for the tribe or a tribal entity for which the reservation was established.").

[17] The new regulations implementing the Self-Determination Act differ in important respects from the earlier regulations cited by the court of appeals. Specifically, the new regulations reflect the view that Tribes should be encouraged, though not required, to enter into self-determination contracts. See 25 C.F.R. 900.3(b)(3) ("The rules contained herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct and administration of those Federal pro-

suggests an affirmative intent to sweep away every principle of state law that might influence Tribes as they make that choice.

B. Blaze also contended in the court of appeals (Pet. App. 13-14) that upholding Arizona's tax would undermine the purposes of the Buy Indian Act, 25 U.S.C. 47. Blaze's reasoning was as follows: (1) under the Buy Indian Act, the BIA gives preference to Indian-owned contractors when awarding contracts to construct or improve Indian reservation roads, Pet. App. 13; (2) the BIA "is not permitted to accord preferences based on bidders' affiliation with the tribe that controls the reservation where the work would be done," *ibid.*; (3) Arizona conceded that its tax could not lawfully have been imposed if the BIA had awarded its contracts to contractors who were affiliated with the Tribe on whose reservation the construction was performed, *ibid.*;[18] and (4) if Arizona can impose its tax upon other Indian-owned contractors, but not on tribal contractors, tribal contractors will be able to underbid other Indian-owned contractors, thereby in effect receiving a preference that the BIA is not permitted to confer, *id.* at 13-14.

It is not entirely clear that federal law would forbid the BIA from granting a preference based in part on a contractor's affiliation with the Tribe on whose reservation the

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grams serving Indian people."), 900.3(b)(5) (decision to enter into self-determination contract and decision not to do so are "equal expressions of self-determination"), 900.3(b)(8) ("It is the policy of the Secretary that the contractability of programs under this Act should be encouraged."), 900.4(c) (regulations should not be construed as requiring Tribes to enter into self-determination contracts).

[18] See Arizona Tax Ruling, note 16, *supra*, at 3 ("Arizona's transaction privilege tax does not apply to business activities performed by businesses owned by an Indian tribe, a tribal entity or an individual tribal member if the business activity takes place on the reservation which was established for the benefit of the tribe.").

contract was to be performed.[19] Even if federal law did preclude the BIA from basing a preference on tribal status, that would not imply that federal law superseded any state law that might have the incidental effect of providing a competitive advantage to contractors bidding to perform work on their own tribal reservations.

C. Finally, Blaze contended (Pet. App. 12) that Arizona's tax is "incompatible with the federal and tribal interest in channeling all available funding toward building and improving reservation roads." Precisely the same could be said of any state tax that falls upon a federal contractor being paid with federal funds appropriated for a particular purpose. This Court's decision in *New Mexico* makes clear that a State is not foreclosed from imposing a tax on a federal contractor simply because the tax will likely increase the federal government's contracting costs. 455 U.S. at 734, 735 n.11.[20]

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[19] In the court of appeals, Blaze relied solely upon language in a Senate report. See Resp. C.A. Br. 13 (citing S. Rep. No. 4, 100th Cong., 1st Sess. 83 (1987)). The provision to which that language relates, however, states only that "nothing in this section shall preclude the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservation roads." 23 U.S.C. 140(d). The general contract language the BIA uses when requiring its contractors to give an Indian preference provides that the preference is to be given "regardless of tribal affiliation." 48 C.F.R. 1426.7002(a), 1452.226-70, 1452.226-71. When work is to be performed on an Indian reservation, that general contract language may be supplemented "by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed." 48 C.F.R. 1426.7005.

[20] When the State imposes a tax on a contractor who contracts directly with a Tribe, the tendency of the tax to deplete tribal resources is a significant though not necessarily dispositive factor in determining whether the state tax is preempted. See *Cotton Petroleum*, 490 U.S. at 179-180; *Ramah Navajo School Bd.*, 458 U.S. at 844 & n.8; *White Mountain Apache Tribe*, 448 U.S. at 151 & n.15.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1998

No. 97-1536

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF ARIZONA EX REL. ARIZONA DEPARTMENT OF REVENUE,
Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Arizona Court of Appeals, Division One

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27 pp

QUESTION PRESENTED

Whether the validity of a state tax on the gross receipts of a federal contractor is governed by intergovernmental tax immunity or Federal Indian law preemption principles.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in

legal issues that affect state and local governments.[1] Of obvious concern to *amici* and their members is the preservation of state taxing authority, including the collection of taxes from federal contractors who engage in commercial activities on Indian reservations.

The issue in this case, whether Arizona can impose a non-discriminatory transaction privilege tax on a federal contractor engaged in construction activity on a reservation, is of particular importance to *amici*. For more than sixty years, it has been the rule that a state gross receipts tax on a federal contractor does not violate intergovernmental tax immunity. *See James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937). The Arizona Court of Appeals disregarded this clear rule and instead applied the multi-factor balancing approach of Indian law preemption analysis to invalidate the tax. It did so notwithstanding that no Tribe was a party to the contract.

The lower court's approach marks an unwarranted expansion of Indian law preemption analysis and interjects great uncertainty into an area where clear rules are necessary for effective fiscal planning. It calls into question the State's authority to enforce both tax laws and other non-discriminatory measures.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Because of the importance of this issue to state and local governments, *amici* submit this brief to assist the Court in its resolution of the case.

STATEMENT

This case arises out of Arizona's attempt to enforce its transaction privilege tax on Blaze Construction Co., which contracted with the United States to build roads on various Indian reservations located in the State. The transaction privilege tax is a form of gross receipts tax, *see* Ariz. Rev. Stat. § 42-1306, which the State imposes on a wide variety of businesses, including prime contractors. *See id.* § 42-1317. The tax does not discriminate against federal contractors.

Under the Federal Lands Highway Program, 23 U.S.C. § 204, the United States Bureau of Indian Affairs (BIA) receives Federal Highway Administration (FHWA) funds for road improvement projects on Indian reservations. Each year, the FHWA advises the BIA's Branch of Roads as to the approximate amount of funds it will receive under the program. Pet. App. 3a. Tribes submit project requests to the Branch of Roads, which decides the scope of the project and the amount to be spent. *Id.* at 3a. The Branch of Roads issues a specification package for each project and BIA's Design Section solicits bids. *Id.* at 4a. After the FHWA authorizes funding for a particular project, BIA awards the contract. *Id.*

BIA awarded Blaze contracts to construct roads and bridges on six Indian reservations located in Arizona. *Id.* at 2a-4a. While Blaze is incorporated under the laws of the Blackfeet Tribe of Oregon, *see id.* at 2a, it is not owned by a member of any of the Arizona Tribes upon whose reservations it performed

the contracts. Blaze was paid entirely by the Federal Government.

Each year the Federal Government, through several agencies, enters into substantial contracts to carry out its programs for Indian tribes. The exact amount of these contracts is not easily ascertainable for various reasons.[2] The amount of budgetary authority for these programs does, however, provide some indication of the size of the Federal Government's contracting on behalf of Tribes. For example, in Fiscal Year 1997, the Indian Reservation Roads program had an authorized funding level of $191 million. *See Indian Reservation Roads Program*, at 3. In Fiscal Year 1997, BIA incurred obligations of $49 million for education construction, $3 million for public safety and justice construction, $51 million for resource management construction, and $16 million for improvements and repairs to various Bureau facilities and systems. *See* Appendix, *Budget Of The United States Government: Fiscal Year 1999* 547 (U.S. G.P.O. 1998).[3]

The Indian Health Service, an agency of the Department of Health and Human Services, received $373,375,000 in Fiscal Year 1998 budgetary author-

[2] Overhead and administrative costs are frequently not readily ascertainable. Moreover, some programs such as the roads program are funded under appropriations made to both the Departments of the Interior and Transportation. *See* Federal Highway Administration & Bureau of Indian Affairs, *Indian Reservation Roads Program Stewardship Plan* 4 (July 1996).

[3] These amounts include administrative costs and are thus greater than actual contract amounts. The data is, however, helpful in demonstrating the magnitude of the Federal Government's contracting on behalf of Tribes and the potential revenue loss to the States.

ity for its Contract Health Services, which purchases "hospital care, physician services, outpatient care, laboratory, dental, radiology, pharmacy, and patient transportation." Indian Health Service, Department Of Health and Human Services, Fiscal Year 1999 Justification of Estimates for Appropriations Committees, 64. The Indian Health Service also contracts with "managed care and health maintenance activities . . . plac[ing] a high priority on developing contracts and rate agreements with private sector providers." *Id.* at 65. In addition, the Indian Health Service received $262 million in Fiscal Year 1997 budgetary authority to "support[] construction, repair and improvement, equipment, and environmental health and facilities." Appendix, *Budget Of The United States: FY 1999*, at 404-05. As the data indicate, the Federal Government makes substantial expenditures for goods and services that are furnished by federal contractors on reservations and large amounts of state tax revenue are therefore at stake in this case.

SUMMARY OF ARGUMENT

1. This Court has long held that a non-discriminatory state tax on the gross receipts of a federal contractor does not violate intergovernmental tax immunity even though the Federal Government shoulders the economic burden of the levy. *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937). The Court has further limited the scope of the immunity to prohibit a state tax only when it falls on the United States, its agencies or instrumentalities. Thus, unless the entity subject to tax is an integral part of, or an arm of, the Federal Government, it is not entitled to

intergovernmental immunity in the absence of Congressional legislation granting it immunity.

Applying these clear principles demonstrates that Blaze is not entitled to immunity from Arizona's tax. Blaze is not an arm or instrumentality of the United States. Rather, it is a corporation organized under the laws of the Blackfeet Tribe of Oregon whose purpose is to engage in commercial activity for profit. Moreover, Congress has not enacted legislation immunizing Blaze and other federal construction contractors from state taxation. Blaze is therefore subject to Arizona's transaction privilege tax.

2. The Arizona Court of Appeals failed to give controlling weight to this Court's intergovernmental tax immunity cases. Instead, it took the unprecedented step of applying the multi-factor balancing approach of Indian preemption analysis notwithstanding that the taxable transaction did not involve a Tribe or its members.

The Court has employed a categorical approach in evaluating state taxation of Tribes and their members on the reservation, imposing a *per se* rule prohibiting such taxes absent Congressional authorization or "cession of jurisdiction." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). In these circumstances, the Court has explained that balancing is not necessary because "the federal tradition of Indian immunity from state taxation" of Tribes and their members on the reservation "is very strong and . . . the state interest in taxation is correspondingly weak." *Id.*

This reasoning applies with equal force when a State asserts taxing authority over a transaction on

a reservation that does not involve a Tribe or its members. As the Court has explained, its "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992). A long line of cases further establishes that in such circumstances, the State's authority to tax is very strong and the federal and tribal interests are correspondingly weak. In these instances, there is no need for the judiciary to rebalance the various interests and usurp Congress' authority in the area. The tax is presumptively valid in the absence of Congressional legislation prohibiting it.

Arizona seeks to tax a transaction which does not involve a Tribe or Tribal members doing business on their home reservation. Such taxation imposes no burden on Tribal interests. Moreover, no provision of Federal law immunizes Blaze's activities from state taxation. In the absence of such legislation, Arizona can lawfully assess its transaction privilege tax against Blaze.

ARGUMENT

THE ARIZONA COURT OF APPEALS ERRED IN HOLDING THAT TAXATION OF THE GROSS RECEIPTS OF A FEDERAL CONTRACTOR IS PREEMPTED BY FEDERAL INDIAN LAW

The Arizona Court of Appeals held that the State could not impose its transaction privilege tax, a nondiscriminatory gross receipts tax, on Blaze Construction Co. for work it performed pursuant to con-

tracts it entered into with the Bureau of Indian Affairs to build roads on six Indian reservations in Arizona. The court held so notwithstanding that Blaze is not owned by a member of a Tribe whose reservation is located in Arizona (and that Blaze performed no work on its owners' home reservation) and that it contracted not with any Tribe but with a Federal agency.

As explained below, the status of the parties to this contract demonstrates that the legality of Arizona's transaction privilege tax is governed for federal law purposes by intergovernmental tax immunity. *See United States v. New Mexico*, 455 U.S. 720 (1982). The Arizona Court of Appeals, however, disregarded the clear rules of the intergovernmental tax immunity doctrine, which require that the tax be upheld, and instead applied Federal Indian law preemption analysis to invalidate the tax. The holding below misreads this Court's cases and marks an unwarranted expansion of Federal Indian law preemption analysis. If affirmed, the decision would threaten the States' authority to enforce a wide range of generally applicable state taxes and regulations on any contractor doing business with the Bureau of Indian Affairs. The judgment of the Arizona Court of Appeals should therefore be reversed.

A. Arizona's Assessment Of Transaction Privilege Tax On Blaze Does Not Violate Intergovernmental Tax Immunity Principles

1. More than sixty years ago, this Court made clear that a state tax on the gross receipts of a contractor that provides services to the Federal Government does not violate the intergovernmental tax immunity doctrine. *See Dravo Contracting*, 302 U.S. at

161. As the Court explained, "a nondiscriminatory tax upon the earnings of an independent contractor derived from services rendered to the government [can]not be said to be 'imposed upon an agency of government in any technical sense,' and [can]not 'be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way.'" *Id.* at 157 (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 524-25 (1926)).

In *United States v. New Mexico*, the Court subsequently explained that the immunity "may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." 455 U.S. at 734. Moreover, "immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government." *Id.* (citing *Dravo Contracting*, 302 U.S. at 154).

Judicial recognition of the immunity is thus "appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *Id.* at 735. The Court's cases thus reject the notion that a contractor is entitled to the immunity because it is a "federal agent." *Id.* at 736. Rather, contracting entities are not immune from state taxation unless they are " 'integral parts of [a governmental department],' and 'arms of the Government deemed by it essential for the performance of governmental functions.'" *Id.* at 737 (quoting *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942)).

As the Court has explained, the reason for the narrow scope of intergovernmental tax immunity is

that Congress can provide a federal contractor with immunity by either "expressly providing as respects contracts in a particular form, or contracts under particular programs." *United States v. New Mexico*, 455 U.S. at 737; *cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76 (1989); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973). Whether a federal contractor is entitled to the immunity is thus a question of Congressional intent. *See United States v. New Mexico*, 455 U.S. at 737-38.

2. Application of these principles demonstrates that Blaze Construction is not entitled to immunity from Arizona's transaction privilege tax. Blaze is not an agency or instrumentality of the United States. Rather, it is a corporation organized under the laws of the Blackfleet Tribe of Oregon, *see* Pet. App. 2a, which was created and exists for the purpose of engaging in "'commercial activities carried on for profit.'" *United States v. New Mexico*, 455 U.S. at 734-35 (quoting *United States v. Boyd*, 378 U.S. 39, 44 (1964)); *see also* J.A. 12a. Congress has demonstrated no intent to "'incorporate[] [Blaze] into the government structure as to become [an] instrumentalit[y] of the United States and thus enjoy governmental immunity.'" *United States v. New Mexico*, 455 U.S. at 736 (quoting *Boyd*, 378 U.S. at 48). Blaze thus stands on the same footing as the Federal contractors whose assertions of entitlement to intergovernmental tax immunity were rejected in *United States v. New Mexico*, *see* 455 U.S. at 739-43, *Boyd*, *see* 378 U.S. at 48, and *Dravo Contracting*. *See* 302 U.S. at 149, 161.

Nor has Congress chosen to provide Blaze with immunity from Arizona's tax. Congress has not enacted a statute exempting contracts of the type Blaze entered into—a fixed fee contract—from state taxation. Moreover, Congress, in enacting the Federal Lands Highway Program, has not exempted federal contractors from state taxation. *See* 23 U.S.C. § 204 (Federal Lands Highway Program). Finally, neither the provisions of the Buy Indian Act (25 U.S.C. § 47) nor the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450e(b)), which Section 204 makes applicable to the Indian Reservation Roads program, demonstrate either expressly or implicitly a Congressional intent to immunize Blaze from state taxation. Congress is, of course, aware of this Court's decisions regarding the scope of intergovernmental tax immunity and its power to immunize federal contractors. Its failure to immunize Blaze from Arizona's transaction privilege tax ought to be the beginning and end of this case.

B. The Arizona Court Of Appeals Erred In Applying Indian Sovereignty Principles To Hold Arizona's Transaction Privilege Tax Preempted

1. The Arizona Court of Appeals gave no explanation as to why this Court's decision in *United States v. New Mexico* is not controlling. *See* Pet. App. 6a-7a. Instead, it proceeded to apply principles of Indian law preemption analysis to invalidate Arizona's tax. The court's application of the Indian preemption doctrine to a tax on a transaction that did not involve a Tribe or Tribal members has no support in this Court's cases and is a troublesome development for state tax and regulatory authority.

To the best of *amici*'s knowledge, this Court has never applied the balancing test of Indian law preemption analysis to an assertion of state authority over a transaction which did not involve a Tribe or its members. This is for good reason, as protecting

Tribal self-government is a principal purpose of the doctrine. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reserv.*, 447 U.S. 134, 161 (1980). Where, as here, a State assesses a tax on a transaction which does not involve a Tribe or its members, the tax does not interfere with tribal sovereignty.

The Court has thus explained that its "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1409 (1997) (rejecting tribal court jurisdiction over auto accident on reservation involving non-tribal members). *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222-24 (1995) (upholding state income tax on members of Chickasaw Nation who worked for Tribe but reside off reservation).

The Court has further explained that "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" which prohibits state taxation "'absent cession of jurisdiction or other federal statutes permitting it.'" *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (quoting *Mescalero Apache Tribe*, 411 U.S. at 148). The Court's "categorical approach," *County of Yakima*, 502 U.S. at 258, is

based on the recognition "that the federal tradition of Indian immunity from state taxation" of Tribes and their members "is very strong and . . . the state interest in taxation is correspondingly weak." *Cabazon Band*, 480 U.S. at 215 n.17. The categorical approach applies, the Court has explained, because "it is unnecessary to rebalance these interests in every case." *Id.*

This reasoning applies with equal force when a State asserts taxing authority over a transaction that does not involve a Tribe or its members. In such circumstances, the exercise of state authority does not interfere with Tribal self-government. *See County of Yakima*, 502 U.S. at 258. Indeed, a long line of cases establishes that in these instances the State's authority to tax is "very strong" and the Federal and Tribal interests are "correspondingly weak." *See Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Thomas v. Gay*, 169 U.S. 264 (1897); *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *cf. Strate*, 117 S.Ct. 1404; *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). In such cases, there is no need for the judiciary to rebalance the various interests and usurp Congress' authority in the area.

In the earliest case, *Utah & Northern Railway*, a corporation challenged a territorial tax on its property located within the boundaries of an Indian reservation. The taxpayer contended that the tax interfered with the provisions of the treaty creating the reservation, asserting in essence a claim that the treaty preempted the territory's exercise of general jurisdiction. *See* 116 U.S. at 31. The Court rejected the argument, noting that "[t]he authority of the

Territory may rightfully extend to all matters not interfering with [the] protection" of the Indians and that "it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it." *Id.* at 31-32. *See also Maricopa & P. R.R. v. Territory of Arizona*, 156 U.S. 347 (1895).

In *Thomas v. Gay*, non-Indians challenged a territorial property tax on their cattle herds which grazed on lands leased from an Indian tribe. The herd owners argued that the tax was "a violation of the rights of the Indians," contending "that the Indians are directly and vitally interested in the property sought to be taxed" because the tax affected the value of the grazing lands. 169 U.S. at 273. The Court dismissed the argument, observing that "it is obvious that a tax upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." *Id.*

The herd owners further argued that the tax "conflict[ed] with the constitutional power of Congress to regulate commerce with the Indian tribes." *Id.* at 274. In this regard, the herd owners contended that Congress had enacted a statute which authorized the Tribes to lease "their unoccupied lands for grazing purposes" and that the tax "interfere[d] with . . . a lawful commercial intercourse with the Indians, over which Congress has absolute control." *Id.*

The Court also rejected this argument, explaining that:

> [t]he unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a State or Territory, of property of others than Indians would be an interference with Congressional power.
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> • • • •
>
> The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.

Id. at 274-75.[4] *See also Montana Catholic Missions*, 200 U.S. at 128-29 (rejecting claim of immunity from state property tax by charitable organizations which used property for benefit of Indians); *Wagoner v. Evans*, 170 U.S. 588 (1898).

As these authorities make clear, where a State does not impose a tax on the commercial relationship between a Tribe and non-Indians, taxation of the activities and property of non-Indians (and non-Tribal members) imposes at most an insubstantial burden on Tribal interests. Because the burden on Tribal and Federal interests is so insubstantial where a Tribe or its members are not taxed, there is no need for judicial reweighing of the relevant interests. The tax is valid in the absence of Congressional legislation prohibiting it.

The Court has also used a categorical approach in cases involving the closely related issue of a State's

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[4] The Court has since made clear that non-Indian lessees of Indian lands are subject to non-discriminatory state taxation of gross production and to production excise taxes. *See Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949).

authority to impose taxes on Tribes and Indians off the reservation. In *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), the Court addressed the validity of state inheritance taxes imposed on the transfer of the estates of deceased members of the Five Civilized Tribes. The Tribes had "no effective tribal autonomy" and their members held their lands in fee. *Id.* at 603. Notwithstanding that the Indians were wards of the United States, the Court refused to exempt them from non-discriminatory state taxes in the absence of express Congressional action granting them an exemption from estate taxes. *See id.* at 603-10. As the Court observed, "This Court has repeatedly said that tax exemptions are not granted by implication" and that this rule applies "to taxing acts affecting Indians as to all others." *Id.* at 606. The Court further explained that "[i]f Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words." *Id.* at 607.

To similar effect is *Mescalero Apache Tribe*. In *Mescalero*, the Court upheld New Mexico's authority to impose a gross receipts tax on a ski resort which the Tribe operated off the reservation. The Court reasoned that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49. In so holding, the Court rejected the Tribe's claim that the Indian Reorganization Act, which encouraged Tribes "to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe," *id.* at 151,

conferred intergovernmental tax immunity on the Tribe's enterprise. *See id.* at 151-55.

Moreover, the Court rejected the Tribe's argument that Section Five of the Indian Reorganization Act, 25 U.S.C. § 465, which provides immunity from state taxes for "any lands or rights acquired" by the Federal Government on behalf of a Tribe or its members, exempted the Tribe's enterprise from the gross receipts tax. As the Court explained, "absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax." 411 U.S. at 156. *See also Chickasaw Nation*, 115 S.Ct. at 2222-24 (upholding Oklahoma's income tax on members of Chickasaw Nation who were employed by Tribe but resided off the reservation).

To reject the clear categorical approach of these cases in favor of the multi-factor balancing test applied by the Arizona Court of Appeals would call into question a wide range of state taxes on non-Indians. For example, non-Tribal employees of federal contractors hired to provide services on Indian reservations might well claim that a state income tax violates Indian sovereignty principles on the ground that the tax reduces the total amount of services the contractor could otherwise provide a Tribe. And similar to this case, federal contractors could contend that state sales and use taxes violate Indian sovereignty principles by reducing the total amount of goods and services which the Federal Government obtains on behalf of a Tribe. The uncertainty and potential for disruption to state taxation inherent in the lower court's methodology demonstrates the wisdom of continued adherence to the categorical ap-

proach of *Thomas* and *Utah & Northern Railway*. And where, as here, a tax falls on a federal contractor, there is no reason for discarding the clear principles of this Court's intergovernmental tax immunity cases in favor of the multi-factor balancing approach of Indian preemption analysis.

2. As authority for applying the balancing approach of Indian preemption law, the Arizona Court of Appeals relied on *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In particular, the lower court relied on this Court's statement that where " 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation,' " the

> "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

Pet. App. 6a (quoting 448 U.S. at 144-45). According to the court of appeals, "[t]his formulation neither suggests nor implies that Indian law preemption analysis is inapplicable when the on-reservation activities of non-Indians over which the state seeks to exercise authority do not arise out of direct commercial relations with the tribe or a tribal entity." *Id.* at 7a. The lower court further reasoned that "nothing in the Court's application of that analysis in *White Mountain* suggests that it implicitly follows any such limitation. The identity of the nominal contracting party in fact played no part in the inquiry." *Id.*

The court's reasoning begs the question of why *White Mountain* would contain such a limitation when the tax was levied on a contractor which did business with a Tribal entity and its ultimate incidence fell on the Tribe. *See* 448 U.S. at 139, 151.[5] This Court decides cases and controversies based on the legal relations of the parties before it and not "upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). It is thus no surprise that *White Mountain* does not address whether Indian law preemption principles apply to a tax on the gross receipts of a federal contractor.

Indeed, while *White Mountain* articulated as a rule of decision the above-described balancing test, at bottom the case was no more than an implied preemption case. As the Court made clear, "[o]ur decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which . . . leaves no room for the additional burdens sought to be imposed by state law." 448 U.S. at 151 n.15 (citing *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965)). In short, the Court would have come to the same result in *White Mountain* simply by applying traditional preemption principles.

This Court's other cases demonstrate that the *White Mountain* balancing approach exists for the middle ground of cases which fall between the *per se* prohibition of taxation of Indian Tribes and their members when on their reservations, *see Cabazon Band*, 480 U.S. at 215 n.17, and the categorical rule allowing

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[5] The Court signalled its awareness of this feature of the case when it indicated that the case presented "the question whether a particular state law may be applied to an Indian reservation or to tribal members." 448 U.S. at 142.

States to apply non-discriminatory taxes to "Indians going beyond reservation boundaries." *Mescalero Apache Tribe*, 411 U.S. at 148. The balancing approach is appropriate where it is not clear at the outset whether state or Tribal interests should prevail. But where, as here, a transaction does not involve an Indian tribe or Tribal members doing business on their home reservation, it is clear that state interests predominate in the absence of Congressional legislation to the contrary. *See id.*; *see also Chickasaw Nation*, 115 S. Ct. at 2222-24.[6]

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[6] The Court's cases have frequently recognized that state interests prevail over Tribal interests even where a State seeks to tax a transaction involving a Tribal enterprise. For example, in *Cotton Petroleum* the Court upheld the imposition of an eight percent oil and gas severance tax on lessees of Indian lands. It noted that while it is

> reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,] [a]ny impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects . . . is simply too indirect and too insubstantial to support Cotton's claim of pre-emption.

490 U.S. at 186-87.

To similar effect are *Colville* and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, the Court upheld the application of state sales taxes to on-the-reservation transactions between Indian retailers and non-Indian customers. *See* 425 U.S. at 482. In *Colville*, the Court held that a State can impose tax on sales to Indians resident on the reservation who were not enrolled in the Tribe. *See* 447 U.S. at 160-61. As the Court noted in *Colville*:

> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

Id. at 161.

If state taxation of BIA's contractors unduly interferes with the administration of the agency's programs, it can seek legislation from Congress preempting such taxes. *Cf.* 25 U.S.C. § 465 (exempting lands acquired by the Secretary of the Interior for Tribes from state and local taxation).[7] For more than sixty years, however, the Federal Government has managed to function notwithstanding that its contractors must pay state gross receipts taxes. *See Dravo Contracting*, 302 U.S. at 161. That Congress has not pro-

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[7] While Tribal interests are not relevant in assessing the validity of Arizona's assessment of Blaze, the Arizona Court of Appeals apparently accepted Blaze's contention that because Tribal contractors are immune from state tax, taxation of BIA contractors conflicts with BIA's regulations because it "attaches an undesirable consequence to a tribe's decision not to seek to administer construction programs in the BIA's place by effectively reducing the road-improvement services that the tribes can receive in return for the available federal funding." Pet. App. 13a (citing 25 C.F.R. § 271.4(d) & (e)).

The same, however, could be said for numerous other non-discriminatory state laws which, under Indian sovereignty principles, might be unenforceable when a Tribe itself contracts. That requiring federal contractors to comply with other state laws might make Tribal contracting more advantageous does not justify holding them preempted. Tribes, after all, retain the choice as to whether to contract directly or through the offices of the authorized federal agency.

hibited States from taxing the gross receipts of BIA contractors establishes that Arizona can lawfully assess its transaction privilege tax on Blaze.

CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

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July 20, 1998

(1)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department Of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

BRIEF OF THE STATES OF CALIFORNIA, COLORADO, FLORIDA, IDAHO, IOWA, MICHIGAN, MONTANA, NEVADA, NEW YORK, NORTH DAKOTA, SOUTH DAKOTA, UTAH AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Indian preemption doctrine determine the validity of a state tax imposed on federal contractors performing work for the Bureau of Indian Affairs on Indian reservations, where that doctrine has previously been applied only to taxpayers contracting with tribes, tribal members or tribal entities.

2. If the Indian preemption doctrine were applicable, does the Federal Lands HIghway Program evince a congressional intent to preempt state tax on the construction of public federal roads built for the Bureau of Indian Affairs on tribal reservations, as required by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

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INTEREST OF THE *AMICI CURIAE*

Amici States regularly impose tax on federal contractors under sanction of the intergovernmental immunity doctrine as explicated in *United States v. New Mexico*, 455 U.S. 720 (1982). The decision below by the Arizona Court of Appeals rendered murky and uncertain this long-standing, bright-line rule. Unwisely, and without legal foundation, it extended application of the special Indian implied preemption doctrine to federal contractors working on tribal lands. The Indian preemption doctrine had previously been applied only to contractors dealing with tribes, tribal members or tribal entities. Amici thus believe the New Mexico Supreme Court's decision in *Blaze Construction Co. v. New Mexico*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 514 U.S. 1016 (1995), which confirms their authority to tax receipts of federal contractors performing services anywhere within the state, is correct.

The uncertainty spawned by the Arizona Court of Appeals' opinion adversely affects States, the federal government and federal contractors. Tax compliance always is enhanced by doctrinal clarity. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2221 (1995) (emphasizing " 'the need for substantial certainty as to the permissible scope of state taxation authority' " in Indian country); *see also County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 267-68 (1992) (criticizing lower court's reasoning that would have resulted in litigation annually, "with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel"). The United States normally pays the cost of state tax imposed on federal contractors. Without predictability on these

issues, States and the federal government will be confused as to when taxes apply, often leaving the unwitting contractor stuck holding the bag.

Even were Indian law preemption principles applicable, the Arizona court's mode of analysis in applying those standards ignores this Court's recognition that where, as here, States provide governmental services on a reservation, they may tax nonmembers with respect to transactions there absent clear congressional intent to the contrary. Instead of that standard, the court below not only required petitioner to establish "a direct connection between the state's governmental services and the taxpayer's on-reservation activities" (Pet. App. 19 (947 P.2d at 843)) but also equated the simple existence of "comprehensive federal regulations" (Pet. App. 23-24 (947 P.2d at 845)) with the existence of the requisite congressional intent to preempt the state tax. Under that standard, a great many state taxes will be preempted notwithstanding the basic notion that, by contributing to the infrastructure of the reservation in ways quite similar, if not virtually identical, to its off-reservation governmental activities, a State helps make available "the privileges of living in an organized society" (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 523 (1937)).

Amici States jealously guard their authority to tax. While none questions the supremacy of Congress to preempt such taxing authority when it invokes one of its enumerated powers, state taxation is too crucial to the very existence of state governments to have it preempted

without a compelling showing of congressional intent – a showing that is palpably absent here.

SUMMARY OF ARGUMENT

Arizona's tax on respondent Blaze Construction Company's receipts from federal road-building contracts is valid under the intergovernmental tax immunity doctrine. *United States v. New Mexico, supra.* No express provision of federal law preempts the Arizona state tax on Blaze's receipts.

The special Indian preemption doctrine applies only to the taxation by States of reservation activities or property of tribes or their members, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 136 (1973), and activities of nonmembers in connection with business relationships with tribes and their members on the reservation, *Warren Trading Post v. Arizona Tax Comm'n*, 350 U.S. 685 (1965); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Prior to the decision below, it had never been applied to relationships between the United States and its contractors.

Even were the Indian preemption doctrine applicable here, it would not act to preempt the Arizona tax. The Court's most definitive exposition of that doctrine for present purposes appears in *Cotton Petroleum* and makes clear that, as a usual matter, a State may tax nonmembers who do business within an Indian reservation regardless

of whether such business is with the resident tribe or its members unless Congress has manifested a contrary intent or the State has abdicated governmental responsibility for the reservation. Here, not only does Arizona provide significant on-reservation services, but the relevant federal statute authorizing Blaze's road building projects at issue – the Federal Lands Highway Program – also evinces an intent to treat all federal contractors equally with respect to bearing the incidence of state taxation and thus counsels directly against respondent's position.

ARGUMENT

The Supremacy Clause embodies two restrictions on the States' power to tax. The "intergovernmental tax immunity" doctrine prevents States, in the absence of explicit authorization from Congress, from directly taxing the federal government. The federal preemption doctrine allows Congress, if it is exercising one of its enumerated powers, affirmatively to preempt state authority to impose tax on transactions that States would otherwise be permitted to tax. *See, e.g.*, 49 U.S.C. § 40116.

In 1982, this Court decided two tax cases that reflect those Supremacy Clause restrictions and serve to define neatly the parameters of the issues in this case. In *United States v. New Mexico, supra*, the Court reaffirmed its repudiation of the "federal instrumentalities" aspect of the intergovernmental immunities doctrine. It held that federal contractors are subject to state tax on their receipts from services provided to the federal government, even

though the tax is passed on to the government, and even though the passed-on tax reduces the amount of services the federal government can buy. *See United States v. California*, 507 U.S. 746 (1993). Just three months later, *Ramah Navajo School Board, Inc. v. Bureau of Revenue, supra*, took a different approach to a state tax imposed on a construction contractor retained by a tribal school board. The Court there employed an interest balancing test that had been crystallized two years earlier in *White Mountain, supra*, for purposes of determining the power of States to tax a tribal non-member with respect to an on-reservation transaction with a tribe or its members. The Court invalidated the tax because it reduced the amount of construction services the tribe could buy, thereby interfering impermissibly with the federal regulatory scheme governing construction of tribal educational facilities.

At issue here are: (1) which doctrine determines the validity of Arizona's tax on Blaze and (2), if the special Indian law preemption principles control, whether the Arizona Court of Appeals properly applied them. The amici States believe that *New Mexico* standards are determinative and compel reversal of the judgment below. Nonetheless, even if Indian preemption principles are used to resolve Blaze's challenge to the tax, the result is unaffected since the requisite congressional intent to preempt is absent.

I. ARIZONA'S AUTHORITY TO TAX BLAZE IS DETERMINED UNDER INTERGOVERNMENTAL TAX IMMUNITY PRINCIPLES, NOT UNDER THE SPECIAL INDIAN PREEMPTION DOCTRINE.

For many years, this Court relied on an extension of the intergovernmental immunity doctrine to invalidate state taxes that arguably imposed an indirect economic burden on the federal government or its instrumentalities – contractors, lessees, employees, including Indian tribal contractors. Taxes were struck down based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract. *South Carolina v. Baker*, 485 U.S. 505, 518 (1988).

In the 1930s the federal instrumentality extension of the intergovernmental immunities doctrine "started a long path in decline. It has now been 'thoroughly repudiated by modern case law.' " *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 173-174 (1989). That repudiation formally occurred in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), where the Court permitted nondiscriminatory state taxes on non-Indian contractors operating on an Indian reservation.

Today, the intergovernmental immunity doctrine prohibits only a direct tax on the federal government. A nondiscriminatory tax "collected from private parties contracting with another government is constitutional even though part or all of the financial burden falls on the other government." *Baker*, 485 U.S. at 521. This Court accordingly has affirmed repeatedly the authority of

States to impose such taxes on federal contractors. *United States v. California, supra; New Mexico, supra*. The parties in this matter agree that Arizona's tax on Blaze is nondiscriminatory. It is the same tax applied to all contractors building roads in Arizona. The intergovernmental immunity doctrine accordingly does not invalidate the tax at issue if that doctrine controls the outcome here.

That *New Mexico* and not the Indian preemption doctrine governs is plain for three reasons. *First* and foremost, the latter doctrine previously has been applied only to taxpayers dealing with tribal entities or tribal members on a reservation. *Warren Trading Post Co.*, at 685-686; (tax on sale of tangibles to tribal members on the reservation); *McClanahan*, 411 U.S. at 165-166; (tax on income earned by tribal member on the reservation); *White Mountain*, 448 U.S. at 139-40 (license and use fuel taxes imposed on nonmember tribal contractor conducting timbering operations solely on the Fort Apache Indian reservation); *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160, 161-62 (1980) (transaction privilege tax on vendor with respect to sale of tractors to tribe taking place on the reservation); *Ramah*, 458 U.S. at 835-36 (gross receipts tax on non-tribal construction contractor with respect to services rendered on the reservation to tribal school board); *Cotton Petroleum*, 490 U.S. at 168-69 (severance tax on non-member lessee for severance of oil and gas from tribal lands pursuant to lease with tribe). It has never been applied to federal contractors, notwithstanding their enormous presence in Indian country.

Second, this Court has "employed a preemption analysis that is informed by historical notions of tribal sovereignty" (*Rice v. Rehner*, 463 U.S. 713, 718 (1983)) – notions that are implicated only when tribal governments, entities or members contract with the taxpayer. The Court thus emphasized in *White Mountain* that "[t]he unique origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." *Id.* at 143. It is equally unhelpful to apply Indian law preemption standards in contexts outside those for which they were developed. Here, the United States is the contracting party, and it would be a strikingly odd result for the federal government to derive a species of tax immunity not from its own sovereign status but derivatively from "a domestic dependent nation[ ]" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) over which it exercises plenary authority and which is powerless to control the relationship giving rise to the taxed gross proceeds. Blaze cannot use analytical sleight-of-hand to place Arizona tribes in the United States' stead for purposes of determining the appropriate preemption standard.

Third, the Arizona Court of Appeals' reasoning is anomalous from a public policy perspective. Although Congress's obligation to fulfill federal trust responsibilities to Indian tribes is certainly important, its obligation to protect the security of the *entire* nation is obviously no less important. Arizona's tax on Blaze was invalidated because it might limit how far federal dollars would go to build Indian reservation roads. But in *New Mexico*, this Court approved state tax on federal contractors building and supporting the nation's nuclear arsenal during the height of the Cold War, reducing by millions of dollars funds available for nuclear deterrence. Such differing treatment of state taxes imposed on federal contractors performing important federal obligations not only is irreconcilable with existing precedent but also makes no sense on quite practical policy grounds.

Blaze's contract with the federal government, in short, does not implicate the special Indian preemption doctrine. Arizona's tax meets the standards in *New Mexico* and is valid.

II. EVEN IF INDIAN PREEMPTION PRINCIPLES ARE APPLIED, THE ARIZONA TAX IS PERMISSIBLE.

While this case should be resolved upon a straightforward application of *New Mexico*, Arizona's transaction privilege tax easily passes constitutional muster when analyzed under preemption principles developed by this Court with respect to taxation of nonmembers actually doing business with a tribe or its members within an Indian reservation. That conclusion flows from *Cotton Petroleum* and its application of the Indian preemption doctrine.

A. Preemption Standards Applicable to Non-members Doing Business on Reservations with Tribes and Tribal Members

After the Supreme Court in the late 1930s thoroughly repudiated the intergovernmental immunity doctrine as applied to federal and tribal contractors, for a period of time the Court generally permitted state taxation of reservation activity. See, *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949). In 1965, however, the Court decided *Warren Trading Post*, the first of a series of cases relying on the federal preemption aspect of the Supremacy Clause to strike down state taxation of tribal contractors' on-reservation activity. Under intergovernmental immunity requirements, state taxation of non-Indian tribal contractors and lessees was no longer automatically forbidden, but Congress could affirmatively act to proscribe such tax by preempting it: "the trend has been away from the ideal of inherent Indian sovereignty as a bar to state jurisdiction and toward a reliance on federal preemption." *McClanahan*, 411 U.S. at 172 (1973). Thus, the inquiry shifted from determining whether Congress had authorized state taxation of non-Indian tribal contractors to whether Congress had forbidden it.

Because of the importance of tax collection to the very existence of state government, the Court had previously found preemption of state taxes only when Congress expressly stated its intention to preempt. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). Implied preemption was not permitted. The cases which initially developed the Indian preemption doctrine, however,

were unique in allowing a finding of congressional intent to preempt state tax by implication. For example, in *Warren Trading Post Co.*, the Court ruled that even though the federal Indian trader statutes, 25 U.S.C. §§ 261, 264, did not expressly preempt state tax, they were "sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.*, 380 U.S. at 690. *Warren Trading Post* relied on the congressional intent implicit in these specific federal statutes to bar States from taxing federally licensed Indian traders on their sales to Indians on a reservation. In *Central Machinery Co.*, the Court again found that the Indian trader statutes preempted state tax on the sale of a tractor to Indians on the reservation because the transaction was covered by the statutes, even though the vendor had neglected to obtain the federal Indian trader license.

The significant feature of this early Indian preemption doctrine was that courts could find federal preemption by implication where reservation transactions with Indian tribes were involved. As this Indian preemption doctrine was developed in the early 1980s, however, it became unlike anything heretofore called federal preemption and increasingly divorced from a determination of congressional intent. In *White Mountain*, the Court emphasized that the Indian preemption doctrine was unprecedented. *Id.*, 448 U.S. at 143. The preemption inquiry no longer called for a determination of whether Congress intended to prevent states from taxing the activity in question and instead pointed to a balancing-of-interests approach, weighing underlying federal policies and purposes with tribal sovereignty interests and state

interests to determine the validity of the state tax. *Id.*, at 144-45. This new approach required a particularized inquiry into the nature of the federal, state and tribal interests at stake to determine whether, in the specific context, the exercise of state authority would violate federal law. *Id.*

Although the Court's opinion sought preemptive intent from pervasive federal regulations covering the harvesting and management of tribal timber, the crux of the decision was based on discerning an "overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . . ' " *Id.*, 448 U.S. at 149. The Court ruled, in effect, that any economic burden on tribal development was enough to invalidate a state tax. The consequence of the Court's ruling in *White Mountain* was to prevent a relatively low, non-discriminatory state tax from being imposed on a tribal contractor because that tax was passed on to the tribal entity and reduced its profits, as all taxes inevitably do. The dissent found it "difficult to believe that these relatively trivial taxes could impose an economic burden that would threaten to 'obstruct federal policies.' " *Id.*, 448 U.S. at 159.

Two years later, in *Ramah*, the Court struck down the New Mexico gross receipts tax imposed on a contractor building a school on the Navajo reservation for the Navajo school board. Once again, the Court cited a comprehensive federal regulatory scheme as the basis of the preemption, but fundamentally relied on the fact that passing on the economic burden of the state tax to the tribal entity "necessarily impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the

funds available for construction of Indian schools." *Id.*, 458 U.S. at 842.

The dissent, cutting to the reality behind the Court's analysis, noted in dissent that the Court had adopted a "new analytic framework in which the extent of economic burden on the tribe, and not the preemptive effect of federal regulations, appears to be the paramount consideration." *Id.*, 458 U.S. at 848 (Rehnquist, J., dissenting.) The dissent also referred to the decision in *United States v. New Mexico*, handed down just three months earlier, which affirmed imposition of New Mexico's gross receipts tax on a federal contractor. The Court there held that "immunity may not be conferred simply because the tax has an effect on the United States, or even because the federal government shoulders the entire economic burden of the levy." *Id.*, 455 U.S. at 734. The dissent noted the anomalous effect of the Court's decision in *Ramah* according an Indian Tribe, whose sovereignty " 'exists only at the sufferance of Congress and is subject to complete defeasance,' greater immunity from state taxes than is enjoyed by the sovereignty of the United States on whom it is dependent." *Ramah*, 458 U.S. at 856-857.[1]

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[1] In many respects, the Court's whole excursion into the balancing of interests test in *Ramah* may have been unnecessary. *Warren Trading Post*, the first Indian implied preemption case, had already held that sales of tangibles to an Indian entity on a reservation were subject to the Indian trader statutes, preempting any state tax. That holding has subsequently been extended to the sale of services. *New Mexico v. Laguna Industries, Inc.*, 855 P.2d 127 (NM 1993). The Indian trader cases alone were sufficient precedent for the preemption of state tax on the sale of construction services to the Ramah Navajo School Board.

Finally, in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Court acknowledged that the special Indian preemption doctrine developed in *White Mountain* and *Ramah* no longer focused primarily on congressional intent. In relying on considerations of competing interests, *"our cases have rejected a narrow focus on congressional intent* to preempt state law as the sole touchstone." *Id.*, 462 U.S. at 334 (emphasis added). The decision went on to identify "[c]ertain broad considerations [which] guide our assessments of the federal and tribal interests." *Id.* It cited several federal statutes which it asserted embodied the general federal commitment to the goal of promoting tribal self government, by which it included "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.' " *Id.*, 462 U.S. at 335. The Court referenced those statutes in a footnote, citing the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Reorganization Act of 1934. *Id.*, note 17.

Thus, the Court's opinions in the early 1980s on Indian preemption sanctioned the conclusion that any tax on a non-member, tribal contractor or lessee, the economic affect of which burdened a tribe, would inevitably be preempted by the general federal policies of encouraging tribal self government and economic development.

What had happened under the guise of this new analytic framework was that the extension of the intergovernmental immunity doctrine to federal instrumentalities – "thoroughly repudiated" in the late 1930s – had resurfaced when applied to tribes. In *White Mountain* and *Ramah* the Court used the special Indian preemption doctrine effectively to restore the intergovernmental

immunity doctrine to bar state taxation of tribal contractors because the economic burden of the tax, no matter how slight, was passed on to the tribal government. These cases had gone beyond finding preemption by implication to find preemption based on something other than congressional intent. Tribes are treated more favorably under this resurgent intergovernmental immunity doctrine than the federal government.

B. *Cotton Petroleum* Restored Congressional Intent As Touchstone of Indian Preemption Analysis

The pendulum began swinging back just six years later in the Court's "pathmarking decision" in *Cotton Petroleum. See Montana v. Crow Tribe*, 118 S. Ct. 1650, 1660 (1998). The Court stated "neither the IMLA, nor any other federal law, categorically preempts state mineral severance taxes imposed, without discrimination, on all extraction enterprises in the State, including on-reservation operations." *Cf. County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) ("[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"). The principles noted in the dissents in *White Mountain* and *Ramah* gained majority support. The Court pulled back somewhat from the resurgent intergovernmental immunity doctrine under which any state tax which might affect tribal economic development was preempted. The Court signaled that change by relying on the intergovernmental immunity doctrine at the start of the decision and by

making clear that contractors of the federal government and tribes are to be treated the same way and are subject to tax "even though the financial burden of the tax may fall on the United States *or the tribe*." *Cotton Petroleum*, 490 U.S. at 175 (emphasis added).

The Court did not overrule the analytic underpinnings of *White Mountain* and *Ramah*. Nor did it fully return Tribes to an equal footing with the federal government under the intergovernmental immunity doctrine, which bars only discriminatory taxes on governmental contractors and lessees. But it did show by the nature of its analysis that it had abandoned the uncertain and unpredictable balancing-of-interests standard, the automatic striking down of any state tax the economic burden of which is passed on to the tribe and the reliance on the amount of federal regulation. The Court looked instead to the congressional intent as indicated in the particular statute authorizing tribal oil and gas leasing, the Indian Mineral Leasing Act of 1938. It found there no express or implied congressional intent to preempt state tax, *Cotton*, 490 U.S. at 177-183, that is to say, unless Congress prohibited the tax, it was not preempted.

Prior to *Cotton*, in *White Mountain* and *Ramah*, the Court had cited extensive federal regulation as a basis for preemption. Regulations governing Cotton's oil and gas severance on Indian lands were no less extensive than regulations governing timber severance in *White Mountain*. Compare the oil and gas regulations found at 25 C.F.R. Part 211, 30 C.F.R. Parts 202 and 206 and 45 C.F.R. Part 3162 with the regulations relied upon in *White Mountain* and *Ramah*. But the Court did not rely on federal regulation; it looked to congressional intent within the

relevant federal statute. *Cotton Petroleum*, 490 U.S. at 205. Indeed, the Court looked squarely at the mineral lessee's claim, based upon a letter submitted by the Secretary of the Interior during congressional consideration of the bill which eventually became the IMLA, that the statute was intended to secure for tribes " 'greatest return from their property.' " *Id.*, 490 U.S. at 179. Notwithstanding "a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue," the Court concluded that "no evidence [exists] for the further supposition that Congress intended to remove all barriers to profit maximization" *Id.* at 180. It found similarly unpersuasive the lessee's reliance on the presence of a provision in an earlier mineral leasing statute applicable to Executive Order reservations, explicitly authorizing imposition of state taxes on oil and gas lessees because, inter alia, "[b]y the time the 1938 Act was enacted, . . . [the intergovernmental tax immunity rule in] *Gillespie* [*v. Oklahoma*, 257 U.S. 501 (1922)] had been overruled and replaced by the modern rule permitting such taxes absent congressional disapproval." *Cotton*, 490 U.S. at 182.

Most significantly, *Cotton Petroleum* rejected the notion of a universally applicable federal policy to encourage tribal economic development that would preempt state tax adversely impacting economic activity on the reservation in every case.

> Nor can a congressional intent to preempt state taxation be found in the Indian Reorganization Act of 1934 . . . , the Indian Financing Act of 1974 . . . , or the Indian Self-Determination and Education Assistance Act of 1975. . . . Although these statutes "evidence to varying

> degrees a congressional concern with fostering tribal self-government and economic development," *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980), they no more express a congressional intent to preempt state taxation of oil and gas lessees than does the 1938 Act.

Cotton Petroleum, 490 U.S. at 183, note 14. Thus *Cotton Petroleum* specifically denied any general preemptive effect of precisely those statutes – the Indian Self-Determination and Education Assistance Act and the Indian Financing Act of 1974 – upon which the Arizona court relied below.

The Court in *Cotton Petroleum* concluded its analysis of the preemption issue with a specific rejection of the expanded view of Indian implied preemption and an acknowledgment that such an analysis had represented an inappropriate revival of the federal instrumentalities corollary of the intergovernmental immunity doctrine. The Court recognized that the indirect effect of the tax on a tribal lessee might impair the federal policy favoring tribal economic development. But it found any such impairment "simply too indirect and too insubstantial to support Cotton's claim of preemption."

> To find preemption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in [*White Mountain v.*] *Bracker* and *Ramah Navajo School Board* would be to return to the pre-1937 doctrine of intergovernmental tax immunity. Any adverse affect on the Tribes finances caused by the taxation of a private party contracting with the tribe would be

> grounds to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.

Cotton Petroleum, 490 U.S. at 187.

Cotton Petroleum did not squarely reject the use of implied preemption to determine the validity of state tax on tribal contractors performing services on reservations. However, it did firmly tie that preemption analysis back to congressional intent. Federal, state and tribal interests at stake remain relevant insofar as they informed Congress's intent. This return to a more bright-line standard provides state courts with an objective criterion upon which to determine whether a state tax has been preempted.

C. Congress Intended These Indian Reservation Roads to Be Treated the Same as Other Federal Lands Highways.

An examination of the federal statute which authorized Blaze's road-building projects makes unmistakably clear that Congress intended that these Indian reservation roads be treated the same as other Federal Lands Highway Program roads. 23 U.S.C. § 204(a) states:

> Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian

reservation roads as defined in section 101 of this title.

This subsection emphasizing uniform treatment was added in Public Law No. 97-424, 96 Stat. 2114, on January 6, 1983. The former 23 U.S.C. § 208 specifically, which explicitly referred to Indian reservation roads, was repealed in the same Act, further driving home the fact that no special treatment is afforded Indian reservation roads.[2]

The Arizona Court of Appeals reasoned that, "because 23 U.S.C. § 204 makes no mention of state taxation," Congress did not intend to address this subject. Pet. App. 14-15 (947 P.2d at 842). That reasoning assumed congressional ignorance of this Court's decisions. Congress has long been fully aware of the Court's rejection in the late 1930s of the federal instrumentality corollary of the intergovernmental immunity doctrine. Moreover, *New Mexico* had just been decided in March 1982, a few months before Congress took up consideration of the amendments to the federal lands highway program in Public Law No. 97-424 between May and December 1982.

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[2] Only a few differences in administration of these several types of roads are provided. Forest highways and public lands highways are administered by the Secretary of Transportation; park roads, parkways and Indian reservation roads are administered by either the Secretary of Transportation or the Secretary of the Interior. Indian employment may be used on Indian reservation roads, and no ceiling on Federal employment is applicable; the "Buy Indian" Act and provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act apply to funds appropriated for Indian reservation roads to permit preferential hiring of Indians. In other respects these programs are administered similarly.

Congress, at just that time, was acutely aware of the state tax consequences for federal contractors; it can have had no question that contractors building federal lands highways on forest land or park land would owe state tax on their receipts from the projects.

Nothing in 23 U.S.C. § 204 intimates that Indian reservation roads are to be treated any differently for state tax purposes. Legislative history instead supports the interpretation that all these federal lands highways are to be treated alike. The Conference Committee Report to the 1983 amendments to that program in Public Law No. 97-424 emphasized that in both the House and Senate bills the "Secretary of Transportation is made responsible for oversight and coordinating the Federal lands highways in order to ensure that such highways are treated under the same uniform policies." H.R. Conf. Rep. No. 97-987, at 45, *reprinted in* 1982 U.S.C.C.A.N. 3692, 3709.

The few regulations promulgated concerning Indian reservation road construction hardly evidence a "comprehensive federal scheme" indicative of a congressional intent to preempt state authority to tax. See 25 C.F.R. § 170 *et seq.* Those regulations show that the Bureau of Indian Affairs – not the tribes – plans, surveys, designs and constructs these roads, just as the other federal administering agencies do for federal lands highways built on other federal lands within those agencies' jurisdiction. The roads must be approved by the Secretary of Transportation. The tribes, like other local governments in whose jurisdiction federal lands highways are being built, establish priorities. Although the tribes may contribute to the cost of these roads, 25 C.F.R. § 170.6a, as may the States, 25 C.F.R. § 170.7, no such contribution is

required, and none was made here. Any alleged preemptive effect of these few regulations is further weakened by the fact that the statute cited by several of the regulations for authority – 23 U.S.C. § 208 – was repealed in 1983.

The absence of any express or implied indication that Congress intended to preempt state authority to tax federal contractors building these federal lands highways should end Blaze's preemption argument. The Arizona court's summary rejection of any consideration of this relevant federal statute completely undermines the validity of its analysis.

In sum, the vice in the Arizona court's application of the Indian preemption doctrine is the confusion it introduces into what the Court has gradually distilled into bright-line standards for state taxation of activities by tribes, their members, and non-members doing business with either. First, States cannot impose the legal incidence of a tax on a tribe or its members with respect to reservation transactions or property absent clear congressional authorization. *See, e.g., Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, ___ U.S. ___, 118 S. Ct. 1904 (1998); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457-60 (1995). Second, States may tax non-members engaged in a reservation business relationship with a tribe or its members – at least where they provide governmental services to the reservation generally – unless Congress has evinced a contrary intent. *See, e.g., Cotton Petroleum*, 490 U.S. at 176-77, 187. These standards can be easily followed by States and taxpayers alike, thereby protecting important state and tribal interest and bringing a very substantial measure of certainty to an area of law that requires certainty. Here, Congress has done

nothing to impair Arizona's right to tax Blaze with respect to its gross receipts from the BIA contracts, and the state tax is therefore valid even if *New Mexico* principles are not deemed controlling.

CONCLUSION

For the reasons stated above, the decision of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

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No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The
Arizona Court Of Appeals, Division One

BRIEF FOR THE GILA RIVER INDIAN COMMUNITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT BLAZE CONSTRUCTION COMPANY, INC.

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24 pp

QUESTION PRESENTED

Is the imposition of a state transaction privilege tax on road construction activity located entirely on Indian reservations pre-empted by the Indian Commerce Clause when the road construction is financed and regulated by the federal government, through the Bureau of Indian Affairs, and the state provides no services and does not otherwise regulate activities related to such road construction.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Gila River Indian Community, a federally – recognized American Indian tribal government organized under a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. Section 476, (the "Community") has a vital interest in the resolution of the present matter inasmuch as what is to be decided is whether a state's taxation authority will be construed to be so expansive as to apply to the gross revenues of a party doing business on reservation lands pursuant to federal contract. The Community, and other American Indian tribal governments, will sustain a direct negative impact on its ability to exercise its own taxation power, a potentially dire impact on the Community's economic resources, should this matter be decided in favor of Petitioner, the state of Arizona. Additionally, this matter presents critical policy concerns as it involves state attempts to tax proceeds derived from a contractual arrangement instrumental to the government-to-government relationship between the federal government, as Trustee, and American Indian tribes, as beneficiary, a relationship that does not include or involve the state of Arizona.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF FACTS

The United States Department of the Interior, Bureau of Indian Affairs (the "BIA"), provides services to the Community through its Pima Agency in fulfillment of the federal government's trust responsibility to American Indians. Indeed, virtually all of the roads on the Reservation were constructed and are maintained by the BIA for the benefit of the Community and Community members in execution of the federal-Indian trust relationship.

Respondent, Blaze Construction Company ("Blaze") is a 100% Indian-owned contracting business, incorporated under the laws of the Blackfeet Nation with its principal place of business in Oregon. The United States, through the Bureau of Indian Affairs (the "BIA"), contracted with Blaze to construct a number of roadways on Indian reservations situated within Arizona. Through its Department of Revenue, Arizona sought to assess its transaction privilege tax upon gross receipts Blaze derived from its contracts with the BIA. Blaze protested the assessment.

The Arizona Tax Court granted summary judgment (unreported) in favor of Arizona, holding that Arizona may tax a contractor conducting business with the United States on Indian reservations situated within Arizona.

The Arizona Court of Appeals reversed the holding of the Arizona Tax Court, concluding that the congressional intent underlying the Buy Indian Act, 25 U.S.C. Section 47; the Indian Self-Determination and Education Assistance Act of 1990, 25 U.S.C. Section 450 *et seq.* and regulations promulgated thereunder pre-empted Arizona's taxation authority. 947 P.2d 836 (Ariz App. 1997).

Arizona appealed the decision to the Arizona Supreme Court, which denied Arizona's petition for review (unreported). Arizona then submitted a petition for writ of certiorari to this Court.

SUMMARY OF ARGUMENT

Petitioner contends that it can rightfully tax an Indian contractor conducting business on an Indian reservation pursuant to contracts between the Indian contractor and the United States, simply because the business occurred within the state's exterior boundaries and it had enacted law unilaterally laying claim to tax revenues derived from on-reservation commerce. In a misbegotten attempt to satisfy the test enunciated by the courts in a number of decisions approving state taxation of reservation-based business activities, Arizona cites certain minimal services provided the Reservation even though the services noted are unrelated to the roads constructed pursuant to the Blaze contracts. *Amicus Curiae* contends that the Arizona Court of Appeals correctly decided this matter in holding that Arizona's taxes are pre-empted by federal law, including primarily the Indian Commerce Clause found within Article I, section 8 of the United States Constitution.

ARGUMENT

The Indian Commerce Clause is the result of a long history of Indian relations beginning with the first contact with the Indians and reflects the intent of the framers

of the United States Constitution that relations with Indians be exclusively reserved to the federal government. The Indian Commerce Clause remains the correct mechanism through which the outcome of this case and future like cases must be determined.

I. THE GENESIS OF THE INDIAN COMMERCE CLAUSE DEMONSTRATES THAT THE INTENT OF THE CLAUSE IS TO PROHIBIT THE STATES FROM INVOLVEMENT WITH INDIAN TRIBES IN COMMERCE AND SIMILAR ACTIVITIES. THE INTENT OF THE INDIAN COMMERCE CLAUSE PRE-EMPTS STATE TAXATION IN THE INSTANT MATTER.

Without ambiguity, the Indian Commerce Clause applies to the regulation of trade and intercourse between the federal government, Indian tribes and the tribes' non-Indian neighbors in the context of transactions occurring wholly within the tribes' reservations. At the very least, the Clause must be read to exempt from state burdens all substantial commerce that benefits the tribes and their members in endeavors that serve the vital interests of reservation communities.

Since the discovery of the lands that presently comprise the United States, the legal entitlements and status of the land's native occupants has continued to trouble this nation's constitutional order. Early federal Indian case law established that the lands in question were "discovered" and that "discovery gave title to the government by whose subjects, or by whose authority, it was made . . . " The rights of those "discovered" were reduced

to a "right of occupancy." *Johnson v. M'Intosh* 21 U.S. (8 Wheat) 543, at 573 and 577 (1823).

Relations in the form of trade between the Indians and settlers, critical to the survival of the colonists, inevitably began and began immediately. While the discovery doctrine devised a legal fiction under which the lands occupied by Indian nations were deemed to be acquisitions of the English crown, it accomplished little to allay the conflicts between the native and colonial populations.

One of the first documented cases evidencing the difficulties of trade relations between Indian tribes and colonists was *The Mohegan Indians v. Connecticut*. *See* Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations*, 422-442 (1950) and Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn.L.Rev. 1055 (Summer 1995). In the 1630's, after Connecticut was settled with the assistance of the Unca Indians, the land was claimed to be the property of the English. The Mohegans disagreed and asserted claims to the property as an independent nation. The matter, eventually appealed to the Crown, was left unresolved for almost three quarters of a century. The unreported decision is important because in it is observed the assignment of Indian affairs to a central, non-localized authority, a principle that proved effective enough to be retained until it found its place in the United States Constitution as the Indian Commerce Clause.

The dilemma of how Indians should be treated remained unanswered even as the cause of colonial independence from the British government took shape. Under the British government, the central government was

responsible for dealing with the Indians, much to the dislike of the colonists. The advantages of centralized governmental power were not overlooked when the Declaration of Independence officially declared the new republic's independence from the British.

Despite the colonists' desire that Indian affairs be locally regulated, the Articles of Confederation, the governing document of the nascent republic, vested authority over relations with the Indians in the centralized government. Article IX of the Articles of Confederation specifically stated that the Congress of the United States shall have, "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." The Articles were presented for passage in 1777 and remained in effect until approximately 1781. *See* Allen Johnson, *Readings in American Constitutional History,* 80 (1912), Robert N. Clinton, *The Dormant Indian Commerce Clause,* 27 Conn.L.Rev. 1055, 1106.

Notwithstanding this reservation of power, local colonial governments continued to assert regulatory control over the Indian tribes with whom they came into contact. Complaints concerning unfair and unethical trade practices persisted and Indian hostilities grew unabated. The need to establish peaceful relations resulted in several treaties whereby the centralized government attempted measures designed to ensure fair and honest dealings by the local governments. *See* Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13; Treaty with the Six

Nations, Oct. 22, 1784, 7 Stat. 15; Treaty of Hopewell with the Cherokees, Nov. 28, 1785.

The treaties, executed pursuant to Article IX of the Articles of Incorporation, indicate the constitutional foundation of United States relations with Indian nations, that the central, federal government was to exercise powers to regulate trade with the Indians and manage Indian affairs, to the exclusion of state authority.

Unfair trade practices were not the only issue that caused concern in the area of Indian affairs. Continued expansion of white settlers resulted in frequent encroachment of Indian lands. Again, the Indians grew hostile and the Continental Congress felt increasing need to officially outline the relations between the Indians and the white settlers. On September 22, 1783, the Continental Congress issued a proclamation that prohibited unauthorized settlement or purchase of Indian lands. The proclamation stated, "it is essential to the welfare and interest of the United States as well as necessary for the maintenance of harmony and friendship with the Indians . . . that all cause or quarrel or complaint between them and the United States, or any of them, should be removed and prevented [therefore all persons are prohibited] from making settlements on lands inhabited or claimed by Indians . . . without the express authority and directions from the United States and Congress assembled." *Journals of the Continental Congress,* 25: 602. Thus the Continental Congress accepted and asserted that the federal government was the sole authority to deal with Indian affairs and that states were themselves foreclosed from undertaking any relations with Indian nations without the express consent of Congress.

Congress reiterated this position a month later in a report of the Committee on Indian Affairs issued on October 15, 1783, which outlined a federal procedure for relations with Indians. Congress went further in passing the *Ordinance for the Regulation of Indian Affairs* on August 7, 1786, which established federal regulations for the granting of trade licenses and licenses to live within Indian territory.

Popular disappointment in the Articles of Confederation resulted in the publication of a series of documents penned to gain support for an organic document to replace the Articles of Confederation. *The Federalist Papers* discussed the goals and priorities of the government and advocated the opinion that it is important for the people to be united under a centralized, federal government. These publications specifically treated the subject of Indian affairs and concluded support for a scheme in which authority over Indian affairs would be vested in the federal government. John Jay, in *Federalist Paper Number 3*, wrote, for example, that "[n]ot a single Indian war has yet been occasioned by aggressions of the present federal government . . . but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who either unable or unwilling to restrain or punish offences, have given occasion to the slaughter of many innocent inhabitants." The wisdom of such an arrangement found support as well in James Madison's *Federalist Paper, Number 42*, which specifically advocated that the federal government should have the authority, "to regulate commerce among the several States and the Indian tribes . . . " The need to foreclose the states from inserting themselves and their

interests into Indian affairs was also addressed in light of the historical record of unfair and greedy practices undertaken against Indian parties, an undeniable source of hostilities between the communities.[2]

The subject of Indian affairs was placed in discussion before the Constitutional Convention on July 11, 1787. Underlying the decision that Indians "not paying taxes" were not to be considered for the purpose of determining representation[3] was recognition that Indians were separate and distinct entities, not a part of any state. (*See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn.L.Rev. 1149 (Summer 1995)). Discussion about Indian affairs did not arise again until August, 1787, when James Madison suggested that the power to "regulate affairs with the Indians . . . " was properly one belonging to the realm of federal power and proposed the addition of language to the proposed Constitution. On September 4, 1787, David Brearley suggested that Madison's language be modified, recommending that authority over commerce with Indian tribes be expressly inserted into the proposed Commerce Clause. Thus, when

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[2] *See also The Federalist Papers, Number 24*, drafted by Alexander Hamilton which advocated that the federal government should have the power to provide for the common defense of the nation and advocated for the establishment of posts to command territory and specifically recognized that some of the posts would border Indian country and "be keys to the trade with the Indian nations." Alexander Hamilton, James Madison, and John Jay, *The Federalist*, (1961) at 208.

[3] James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 119 (1787). This formula for determining representation remained in effect until approximately 1868.

the Constitution was approved on September 12, 1787, Article I, Section 8 of the United States Constitution read, "Congress shall have the Power . . . to regulate Commerce with . . . the Indian tribes."

Statutory enactments and case law comporting with the clear Constitutional scheme foreclosing state activities from relations with Indian tribes followed with secure acceptance until well into the twentieth century. Article III of the *Northwest Ordinance* states, "[t]he utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them." *Northwest Ordinance*, July 13, 1787. The *Trade and Intercourse Act*, U.S. Statutes at Large 1: 137-38, prohibited trade or other relations with Indian tribes without a license issued by an appropriate party as designated by the President of the United States.

Early cases before the federal courts further demonstrate that relations with Indian tribes were intended to be exclusive with only the federal government. In 1823, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), for example, Chief Justice Marshall, writing for the court, recognized the federal government, as the absolute title holder with respect to Indian lands, with the Indian inhabitants of the controverted lands retaining a mere right of possession. "An absolute title," Marshall stated, "cannot exist, at the same time, in different persons, *or in*

different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it." *Id.* at 588. (Emphasis added). Marshall concludes his analysis ruling that "[t]he claim of the government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right." *Id.* at 603.

In the following year, Chief Justice Marshall authored the decision of *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), advanced the doctrine that federal law is supreme in instances in which federal and state law is in conflict. Further, the Court found that the term "regulate" implies exclusive power over the activity regulated to the exclusion of other governments seeking to assert their own regulation. Because the Constitution vested the power to regulate commerce with Indian affairs in the federal government, states are prevented from exercising the same power.

In subsequent decisions, Chief Justice Marshall outlined the relationship between the United States and Indian tribes. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831), for example, the Chief Justice gave further articulation to the legal status of Indian tribes as "domestic dependent Nation[s]." Further, the Court opined, "in any attempt to intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States . . . they admit the United States shall have the *sole and exclusive* right of regulating the trade with them, and managing *all* their affairs as they think proper." *Id.* at 17. (Emphasis added.) As domestic dependent nations, the Court analogized the

relationship of the Indian tribes to the federal government as that "of a ward to a guardian," *id.* at 17, and, as such, any attempt to acquire Indian land "would be considered by all as an invasion of [the] territory, and an act of hostility" against the guardian, the United States. *Id.* at 17-18.

Finally in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court utilized the principle outlined in *Gibbons v. Ogden* that, in the event of conflict, State law is superceded by federal law. *Worcester* involved the state of Georgia's attempt to exert its authority over activities of an individual residing within the Cherokee Nation with the permission of the Cherokee Nation and the United States, but in violation of a Georgia statute. The opinion of the Court specifically recognized that, "[t]he whole intercourse between the United States and [the Cherokee] nation, is, by our Constitution and laws, vested in the government of the United States." *Worcester* at 561.

The series of cases discussed above demonstrate the exclusive authority of the federal government in all relations with Indian tribes which is a fundamental provision of this nation's constitutional legacy. This arrangement embodies the framer's intent to protect the rights of Indian people from intrusion by and unfair practices of the states.

II. THE DOCTRINE OF CONSTITUTIONAL PREEMPTION SUPPORTS THE EXCLUSION OF ARIZONA'S TAXATION AUTHORITY VIS-Á-VIS RESPONDENT.

Of its own force, the Indian Commerce Clause preempts state regulation and taxation of on-reservation trade that is intended to benefit tribal members. When understood in its historical context, the Indian Commerce Clause authorizes complete and absolute federal regulation of trading on Indian reservations to the exclusion of state authority. Congress's fealty to the principle that the federal government's authority over Indian relations is absolute, exclusive, is evident in the provisions of the Indian Trade and Intercourse Acts, which made clear that federal regulation would be restrictive, if not prohibitive, and exclusive in its very nature. *See, e.g.*, Act of March 1, 1793, ch. 19, Section 67, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732; 25 U.S.C. 263. But it was not only the power granted to Congress that was more pervasive and directed to a distinct goal; the Indian Commerce Clause had a significant negative impact on state action. The position of the *Amicus Curiae* is that the Clause reserved to the national government exclusive authority, absent any delegation thereof, for the regulation of intercourse with Indian tribes. Madison's vision that the Indian Commerce Clause, in entrusting the national government with exclusive authority over intercourse with Indian tribes, would resolve the tensions prevalent among the states with respect to Indian commerce, prevailed in the early years of the Republic.

It is not surprising that this Court, during the century after the Constitution was implemented, upheld Congress's exclusive and absolute power to regulate

commerce with the Indian tribes in *United States v. Forty-Three Gallons of Whiskey*, 98 U.S. 188, 194 (1876). The Court reached this conclusion following its review of the history of the Indian Commerce Clause and in which it was decided that the provisions of the Indian Commerce Clause intentionally altered the regulatory scheme of the Articles of Confederation, which did not include Indian commerce as a dominion of federal authority. This Court may have stepped back from this principle in recent times, but the Clause is available for active service whenever called.

Amicus Curiae suggests that the appropriate rule is that, absent congressional authority expressly delegated, the Indian Commerce Clause does not tolerate a state tax directly upon on essential commerce intended to directly benefit Indians. The direct and beneficial impact of the transaction in the instant matter, for Indians, remains within exclusive federal control and therefore beyond the State's power to tax.

It is beyond doubt that when the states joined the republic established by the Constitution of 1787, they relinquished their claims to participate in Indian affairs and accepted the national government's exclusive authority in this area. The Indian Commerce Clause speaks directly to the regulation of trade and intercourse between Indian tribes, within their territories and their non-Indian neighbors. Properly read, the Indian Commerce Clause prevents state interference in all transactions occurring on Indian reservations that are intended to specifically benefit Indians.

The matter at hand involves an Indian contractor constructing roads for the United States, Department of Interior, Bureau of Indian Affairs. Consistent with the "guardian-ward" relationship first pronounced in *Cherokee Nation v. Georgia*, the Bureau of Indian Affairs, an instrumentality of the United States, has the authority to enter into such agreements for the benefit of the "domestic dependent" Indians. The recipient of the benefit of the roadways is primarily the Indian tribe and its members, not the state of Arizona. Ownership of the roads, including their maintenance, remains in the United States and in no manner involves Arizona interests. Arizona does not participate in the road construction, maintenance or even patrol of these roadways. In fact, in all aspects the role of the State of Arizona on Indian reservation roads is de minimus. Further, the revenues generated by Arizona's tax would not be used to support or provide services for these roads. It therefore defies logic that Arizona's taxes would have any jurisdictional basis in respect to proceeds derived by the Respondent under his contracts with the federal government.

Throughout the changes in the form of government, British rule, the Articles of Confederation and the United States Constitution, one doctrine has remained constant; the central government must have sole and exclusive authority over Indian affairs to protect the Indians from state greed. Based on the lengthy history of the Indian Commerce Clause it is clear that the intent of the Clause was to prohibit state interference in activities in Indian country. The history of the Indian Commerce Clause represents regulation in matters involving Indian nations that is so expansive that there is no room for Arizona's

taxation in this case. The Buy Indian Act, 25 U.S.C. § 47, BIA regulations and the Indian Self-Determination and Education Assistance Act of 1990, 25 U.S.C. § 450 *et seq.*

Further, in accordance with the doctrine that federal law is supreme to state law and in the event of conflict, federal law applies as established in *Gibbons v. Ogden* in 1824, the imposition of Arizona's asserted ability to tax in these circumstances must yield to the original intent of the framers of the Constitution in drafting the Indian Commerce Clause that matters involving Indians is the exclusive authority of the federal government.

III. ARIZONA'S IMPOSITION OF TAXES IN THIS CASE INTERFERES WITH TRIBAL SOVEREIGNTY.

As previously stated, recent trends in case law reflect that imposition of state law in certain circumstances is allowable, conditioned upon a balancing of interests and provided that there is no interference with tribal self-regulation. *See Williams v. Lee*, 358 U.S. 217 (1959); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 447 U.S. 135 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980); *United States v. New Mexico*, 455 U.S. 720 (1982). Arizona's imposition of the tax in the current case represents a significant interference with tribal self-regulation and sovereignty. The facts of this case show that Arizona has *no* involvement with the issues at hand. *See Transcript of Hearing Before Department of Revenue Hearing Officer*, Joint Appendix. Arizona cites the provision of minimal services to a single public school on the reservation and almost non-existent police services through the Arizona Department of Public Safety, yet fails to demonstrate how the provision of the services relate to Respondent's activities or how its interests in the taxation of the contractor outweigh the interest of the tribe and United States in tax exemption. As stated previously, the roads will remain the property of the United States and maintenance of such roadways will remain the responsibility of the United States. Police protection will be primarily the duty of the tribal government. While some BIA roads connect to state routes, they primarily serve the Community's rural setting. While the roads are open to the general public, there is little or no provision of services by Arizona that could remotely justify the imposition of taxes in this instance.

The United States and all tribal governments, on the other hand, carry a significant interest in the general welfare of their memberships and the obligation to provide transportation infrastructure through which the needs of their communities can be served. If Arizona is allowed to tax in this instance, despite the fact that the tax will be passed along to the United States, it is not the United States, but American Indian tribal governments that will feel the substantial impact of a decision by this Court in Arizona's favor. Tribes and their members will in actuality carry the burden and suffer the consequences of a tax approved in this matter and the sovereign powers of the tribes will therefore be significantly interfered with. Arizona's efforts to intrude into tribal sovereignty

through the assertion of its taxes upon Blaze must not receive the approval of this Court.

CONCLUSION

The history of relations with the Indians demonstrates that the Indian Commerce Clause must be afforded due deference. This means that the national government has exclusive authority over intercourse with transactions that benefit Indian tribes and their members that occur on Indian reservations. The State of Arizona may not impose its tax on the Respondent. The judgment of the lower court must be affirmed.

Respectfully submitted,

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(10)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.,
Arizona Department of Revenue,

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BLAZE CONSTRUCTION COMPANY, INC.,

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On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether a State may impose a transaction privilege tax on a contractor who enters into contracts with the Bureau of Indian Affairs to construct and improve roads on an Indian reservation, where there is a comprehensive reservation road regulatory scheme with substantial involvement of the Indian nation.

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INTEREST OF THE *AMICUS CURIAE*

This case concerns the State of Arizona's attempt to impose its transaction privilege tax on a contractor for services related to the construction of roads on behalf of the Bureau of Indian Affairs ("BIA"), an agency of the United States. The road projects are located entirely within the exterior boundaries of Indian reservations. The Arizona Court of Appeals held that the State's assessment of the transaction privilege tax on the contractor's gross proceeds from building roads for the Bureau of Indian Affairs on Indian reservations was preempted by the comprehensive federal Indian policies of promoting tribal self-sufficiency and economic development.

The Navajo Tribe of Indians (the Navajo Nation) is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 200,000 members and occupying approximately 25,000 square miles of trust lands within the three states, Arizona, New Mexico and Utah.[1] The Navajo Nation government exercises governmental jurisdiction over the Navajo Nation. The Navajo Nation government provides a wide variety of governmental services throughout its jurisdiction. The State of Arizona's attempt to impose a transaction

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[1] Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993).

privilege tax on respondent would interfere with the Navajo Nation's short and long range road plans.[2]

STATEMENT OF FACTS

The Navajo Tribe of Indians (the Navajo Nation) is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of more than 200,000 members and occupying approximately 25,000 square miles of trust lands within the three states, Arizona, New Mexico and Utah.[3] Approximately 69 percent of the land is utilized for grazing. The traditional style of sheep herding provided a stable lifestyle in the past, and continues to provide supplemental income for many tribal members. As a result, Navajo Nation members live sparsely across the Navajo Nation with an average density of 6.37 people per square mile.

The present Navajo government structure is a form of a three-branch government: the Executive Branch, the

[2] The parties have consented to the filing of this brief by the Navajo Nation. The consents have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, amicus states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief.

[3] Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993).

Legislative Branch, and the Judicial Branch. The Executive Branch includes the President of the Navajo Nation, the Vice President, and appointed officials overseeing 10 divisions and several offices. The Legislative Branch consists of the Speaker of the Council and the Navajo Nation Council comprised of 88 elected council delegates representing 110 chapters.[4] The Judicial Branch includes the Chief Justice and the Navajo Nation courts. Elections for the President and the delegates are held every four years in November.[5]

Navajo BIA Roads are constructed and approved pursuant to 23 U.S.C. §204. Funds for road construction and improvement on the Navajo Indian Reservation are appropriated in a lump sum for each fiscal year from the federal Highway Trust Fund. Transportation Equity Act §1101(a)(8), 112 Stat. 112. The funds available for Indian tribes are allocated based on a formula established by the Secretary of Interior pursuant to a negotiated rulemaking procedure with involvement of tribal representatives. Pursuant to regulation, the Commissioner of Indian Affairs has the responsibility to plan, survey, design and construct the Indian reservation roads. 25 C.F.R. §§170.2(d), 170.3, 170.4, 170.4(a). The Secretary of Transportation must approve the location, type, and design of all projects on the Navajo BIA Road System. 25 C.F.R. §170.4.

[4] A chapter is a political subdivision of the Navajo Nation government. A chapter may be similar to a county in a state government setting.

[5] The Navajo Nation government is not engaged in any gaming enterprise.

Pursuant to Title 1 of the Indian Self-Determination and Educational Assistance Act, the Navajo Nation has entered into an intergovernmental agreement for the Transportation Planning of the Navajo BIA Reservation Road system. 25 U.S.C. §450, *et seq*. The Navajo BIA Road System consists of 6,184.2 miles of roads. State and county roads within the Navajo Nation account for approximately 3,197 miles of roads in the three state area in which the Navajo Nation is located.[6] The Navajo Nation is geographically divided into five agencies. The road projects are reviewed and recommended by five agency road committees.[7] These projects are usually derived from chapter requests. The Navajo Department of Transportation is an agency, of the Navajo Nation government, which oversees and coordinates road development on the Navajo Reservation. It participates in, approves and receives all information on reservation road planning and construction programs.

The Transportation and Community Development Committee of the Navajo Nation Council is the Navajo Nation legislative oversight committee for all road and transportation matters within the Navajo Nation. It gives final approval to all reservation road construction project lists, road plans and oversees the coordination of all

[6] Navajo Nation Department of Transportation, *Navajo Nation Long Range Comprehensive Transportation Plan*, ch. III (1998).

[7] The agency road committees are local Navajo transportation boards appointed by Navajo Agency delegation boards (comprised of district and chapter officials) as the local Navajo representatives.

transportation activities within the Navajo Nation. 2 NNC §§421, 423.[8]

SUMMARY OF ARGUMENT

This case involves the application of the Arizona transaction privilege tax to BIA road construction activities performed within Indian reservations located within the State of Arizona. The federal government has developed a comprehensive reservation road regulatory scheme.

This court has identified the relevant federal, tribal and state interests to be considered in determining whether a particular exercise of state authority violates federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). See also *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982). The presence of this comprehensive reservation road regulatory scheme leaves no room for the additional burden sought to be imposed by the State of Arizona through its taxation of the gross receipts paid to Blaze Construction. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 842. Like the State in *Ramah*, the State of Arizona simply has nothing to do with the reservation road construction activity it seeks to tax. *Ramah*, 458 U.S. at 843.

[8] The Navajo Nation Code shall be cited as "NNC".

Thus, the state transaction privilege tax is unlawful and the decision of the Arizona Court of Appeals should be affirmed.

ARGUMENT

THE IMPOSITION OF THE ARIZONA TRANSACTION PRIVILEGE TAX INTERFERES WITH TRIBAL SELF GOVERNMENT.

There is an established policy of leaving Indians free from state jurisdiction in this country. *Rice v. Olson,* 324 U.S. 786, 789 (1945). This policy is based on the principle that Indian nations are distinct political communities which possess exclusive authority within the exterior boundaries of their territory. *Worchester v. Georgia,* 6 Pet. 515 (1832). As long as the tribal organization remains intact and recognized by the United States government as existing, a tribe is "distinct from others" separate from the jurisdiction of the state and to be governed exclusively by the government of the United States. *The Kansas Indians,* 5 Wall. 737, 755 (1867).

The Navajo Nation entered into a treaty with the federal government in 1868. In return for their promise to keep peace the treaty set aside for the use and occupation of the Navajo tribe of Indians a portion of what had been their native country. 15 Stat. 667, 668. This treaty should be interpreted under the rule that doubtful expressions are to be resolved in favor of the Navajo Nation. *Carpenter v. Shaw,* 280 U.S. 363, 367 (1930). It would be logical to conclude that the Navajo treaty " . . . established the lands as within the exclusive sovereignty of the Navajos

under general federal supervision." *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 174-75 (1973). This is the same interpretation that was made to preclude the imposition of a state tax law on the Navajo reservation. See *Warren Trading Post Co. v. Arizona Tax Comm.,* 380 U.S. 685, 687, 690 (1965).

This court has identified the relevant federal, tribal and state interests to be considered in determining whether a particular exercise of state authority violates federal law. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980). See also *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832, 837 (1982). The federal and tribal interests arose from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Art. 1, §8 cl. 3, and from the semiautonomous status of Indian tribes. *White Mountain,* 448 U.S. at 145 (1980). The Court has referenced a number of congressional enactments revealing a strong and definite federal policy of promoting tribal self-sufficiency and economic development. As a result ambiguities in federal law should be construed generously to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 174-175 (1973).

In *White Mountain,* the federal government undertook comprehensive regulation of the harvesting and sale of tribal timber. The federal regulation scheme was found to be so pervasive that it precluded the imposition of the additional burdens of a relevant state tax. *White Mountain,* 448 U.S. at 148. The BIA was involved in virtually every aspect of the production and marketing of Indian

timber. The BIA established bidding procedures, set mandatory terms to be included in every contract and required all contracts be approved by the Secretary of Interior. *White Mountain*, 448 U.S. at 147.

In *Ramah*, the BIA possessed wide ranging monitoring and review authority. The BIA was required to conduct preliminary on site inspections, and prepare cost estimates for the project in cooperation with the Board. The Board was required to approve any architectural and engineering agreements. The BIA required certain terms to be included in the subcontracting agreements. The Board was required to maintain records for inspection by the Secretary of Interior. The Court held that direction by the federal government for the construction of Indian schools left no room for the additional burden sought to be imposed by the State of New Mexico through its taxation of the gross receipts of the construction contractor. *Ramah*, 458 U.S. at 842. The State of New Mexico was precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education – a scheme which has "left the State with no duties or responsibilities." *Ramah*, 458 U.S. at 843.

The attempt by the State of Arizona to impose its transaction privilege tax on the reservation road contractor, in this case, simply cannot be reconciled with neither *White Mountain* nor *Ramah*. A regulatory scheme exists for the construction of Indian reservation roads similar to the detailed and comprehensive regulatory schemes that were present in *White Mountain* and *Ramah*. The regulatory scheme developed under 25 C.F.R. §170.3 sets out the planning, surveying, designing and construction phases of Indian reservation roads by the Commissioner of

Indian Affairs. The Secretary of Transportation is required to approve location, type and design of all Indian reservation road projects before any construction expenditures are made. 25 C.F.R. §170.4. Tribes shall establish annual priorities for road construction projects. 25 C.F.R. §170.4(a). The procedure for obtaining right-of-way is governed by part 169 of the regulations. 25 C.F.R. §170.5. The maintenance of Indian reservation roads is basically a local function. 25 C.F.R. §170.6. The Commissioner may enter into an agreement for tribal contributions. 25 C.F.R. §170.6(a). The Commissioner may enter into agreements with states for cooperation in the construction or maintenance of reservation roads and bridges. 25 C.F.R. §170.7. The Navajo Nation government is heavily implicated in the road planning and selection process. It is quite apparent that a comprehensive and detailed reservation road regulatory scheme is present.

The presence of this comprehensive regulatory scheme simply leaves no room for the additional burden sought to be imposed by the State of Arizona through its taxation of the gross receipts paid to Blaze Construction. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 842. Like the State in *Ramah*, the State of Arizona simply has nothing to do with the reservation road construction activity it seeks to tax. *Ramah*, 458 U.S. at 843.

CONCLUSION

This Court has identified the relevant federal, tribal and state interests to be considered in determining whether a particular exercise of state authority violates

federal law. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980). See also *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832, 837 (1982). Neither *White Mountain* nor *Ramah* tolerate the attempt by the State of Arizona to impose its transaction privilege tax on the reservation road contractor. A regulatory scheme exists for the construction of Indian reservation roads similar to the detailed and comprehensive schemes that were present in *White Mountain* and *Ramah*. The Navajo Nation government is extensively involved in the reservation road scheme. The presence of this comprehensive regulatory scheme leaves no room for the additional burden sought to be imposed by the State of Arizona through its taxation of the gross receipts paid to Blaze Construction. *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832, 842. Like the State in *Ramah,* the State of Arizona simply has nothing to do with the reservation road construction activity it seeks to tax. *Ramah,* 458 U.S. at 843.

The state transaction privilege tax is clearly unlawful. The decision of the Arizona Court of Appeals should be affirmed.

Respectfully submitted,

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No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel. Arizona Department of Revenue,

Petitioner,

vs.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals, Division One

BRIEF OF *AMICUS CURIAE* SAN CARLOS APACHE INDIAN TRIBE IN SUPPORT OF RESPONDENT

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CONSENT OF PARTIES

Petitioner, and respondent have consented to the filing of this brief, *amici curiae*.[1]

INTEREST OF THE *AMICI CURIAE*

Amici, a federally recognized Indian Tribe organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934 (48 stat. 984), has a vital interest in the legal issues that affect tribal self-government and sovereignty. Of obvious concern to *amici* is the Indian tribe's right to self-government to make decisions regarding its infrastructure on the reservation.

The issue in this case, whether Arizona's transaction privilege tax impermissibly interferes with an Indian tribe's right to self-government to make policy decisions regarding the welfare of its tribe, is of particular importance to *amici*. The Arizona Court of Appeals correctly applied a multi-factor balancing approach of Indian law preemption to invalidate the tax, an approach that carefully considered the affects of an Indian tribe's right of self-governance and tribal sovereignty.

Because of the importance of this issue to Indian tribes, *amici* submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

Arizona's tax on respondent Blaze Construction Company's receipts from federal road-building contracts is invalid under principles of Indian law preemption. The Arizona Court of Appeals correctly applied Indian law preemption analysis to Arizona's transaction tax that significantly affects tribal self-government and tribal sovereignty. Under Indian law preemption analysis, Arizona's assessment of transaction privilege tax on Blaze Construction's gross receipts from building roads for Bureau of Indian Affairs (BIA) on Indian reservations should be preempted in light of comprehensive federal Indian policies and significant

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1. Their consents have been filed with the clerk of this Court. This brief was authored by the amici and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the amici and their counsel made any monetary contribution to the preparations or submission of this brief.

tribal interests. In addition, since the state has not provided any services related to on-reservation activities, it has no authority to impose the tax.

ARGUMENT

THE ARIZONA COURT OF APPEALS CORRECTLY HELD THAT ARIZONA'S ASSESSMENT OF TRANSACTION PRIVILEGE TAX ON CONTRACTOR'S GROSS PROCEEDS FOR BUILDING ROADS ON INDIAN RESERVATION IS PREEMPTED.

The Arizona Court of Appeals correctly held that the State could not impose its transaction privilege tax on Blaze Construction for work it performed pursuant to contracts it entered into with the Bureau of Indian Affairs to build road on Indian reservations in Arizona. The issue is whether the State's imposition of the transaction privilege tax unduly burden Indian tribe's right to self-governance and tribal sovereignty.

I. THE ARIZONA COURT OF APPEALS CORRECTLY APPLIED INDIAN PREEMPTION ANALYSIS ON STATE'S AUTHORITY TO IMPOSE A TRANSACTION PRIVILEGE TAX THAT SIGNIFICANTLY AFFECTS FEDERAL AND TRIBAL INTERESTS.

According to this Court, tribal sovereign immunity springs form the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, Handbook of Federal Indian Law 122 (1945)) (emphasis omitted). Against this backdrop of tribal sovereignty, when a State asserts authority over conduct of non-indians engaging in activity (imposition of a transaction privilege tax) on the reservation, this Court should carefully evaluate the extent to which tribal self-government and tribal sovereignty is hindered. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S. Ct. 2378, 2386 (1983). Therefore, the proper method to determine whether tribal sovereignty is limited under these circumstances is through a thorough Indian law preemption analysis. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980).

This Court articulated the modern formulation of Indian law preemption analysis in *White Mountain Apache Tribe*.

> When on-reservation conduct involving Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is strongest. [Citations omitted]. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of *sovereignty that have developed from historical traditions of tribal independence*. This inquiry is not dependent on the mechanical or absolute conceptions of state sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . .

Ibid. at 448 U.S. 136, 144-45, 100 S. Ct. 2578, 2584 (emphasis added). Since it is clear that Indian Tribe's play a fundamental role in determining what, if any, construction projects are granted by the Bureau of Indian Affairs, any imposition of state authority over the ability of the Indian Tribe's to exercise such authority must be carefully scrutinized. *See* 25 C.F.R. § 900.3(b)(5) ("tribal decisions to contract or not to contract are equal expressions of self-determination"). The fact that the BIA and not the Indian Tribe itself is a party to the contract is not dispositive of whether an Indian law preemption analysis is applicable. *White Mountain Apache Tribe*, at 148-49, 150-51, 100 S. Ct. at 2586-87, 2587.

> In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject. The Court has repeatedly emphasized that there is *a significant geographical component to tribal sovereignty, a component that*

> *remains highly relevant to the pre-emption inquiry*; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Ibid (emphasis added).

Therefore, Arizona's imposition of the transaction privilege tax on Blaze Construction on the gross proceeds from its contracts with the BIA can only be resolved by reference to Indian law preemption analysis as developed by this Court.

II. ARIZONA'S ASSESSMENT OF THE TRANSACTION PRIVILEGE TAX MUST BE PREEMPTED IN LIGHT OF SIGNIFICANT FEDERAL AND TRIBAL INTERESTS AND A LACK OF ANY SERVICES PROVIDED BY THE STATE.

As noted above, the formulation of the Indian preemption analysis was formulated in *White Mountain Apache Tribe. Ibid.* The test to determine whether the tax is valid must consider the state, federal and tribal interests and whether the exercise of state authority would violate federal law. *Ibid* at 448 U.S. at 145, 100 S. Ct. at 2584. "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State's interests at stake are sufficient to justify the assertion of State authority." *New Mexico,* 462 U.S. 324, 334, 103 S. Ct. 2378, 2386.

In the instant case, Arizona's tax infringes on the tribal right of self-governance and tribal sovereignty. Road construction is a central function of tribal government and affects the welfare and safety of its community members. As mentioned earlier, tribal governments have the authority to determine when, where and how roads will be built on the reservation. *See* 23 U.S.C. § 204(a), (e); 23 U.S.C. § 450a(b); 25 C.F.R. §§ 170.4a, 900.119. The imposition of the Arizona transaction privilege tax interferes with and may force tribes to enter into Self-Determination contracts. 25 C.F.R. §§ 271.1 through 271.5 (1996). In addition, the imposition of the tax is incompatible with the federal interest to channel as

much resources as possible toward building and improving reservation roads. *See* 137 Cong. Rec. S7787 (daily ed. June 13, 1991) (Statement of Sen. Domenici regarding increasing funding for Indian road program).

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698 1989), this Court was faced with a similar situation regarding the state's authority to tax on-reservation conduct involving non-Indians. This Court, after a careful analysis of federal, tribal and state interests, held that a New Mexico tax on on-reservation oil production was not pre-empted under Indian law preemption analysis. *Ibid.* This Court held that since the state regulated the reservation oil wells, there was sufficient state interest to justify the assertion of state authority. *Ibid.* In contrast, Arizona can claim no significant on-reservation activity related to this transaction privilege tax. *See* 25 C.F.R. §§ 170.1 through 170.9 (state has no official role in planning, surveying, designing, constructing, repairing, using or maintaining BIA roads on reservations). Therefore, since Arizona has no interest related to the road construction projects, save tax it, the imposition of the transaction privilege tax unduly burdens tribal self-government and sovereignty.

CONCLUSION

For the foregoing reasons, *amici* requests that the United States Supreme Court affirm the opinion by the Arizona Court of Appeals.

Dated August 20, 1998

Respectfully submitted,

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No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

BRIEF *AMICI CURIAE* OF FRANK ADSON, ANITA AHHAITTY, VANESSA GOODEAGLE, ALVIN MOORE, DENISE MOORE, RANDALL TIGER AND SAMUEL VETER IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI[1]

Amici are seven members of federally recognized tribes who live and work within Indian country, though not necessarily that of their own tribes. Several are married to members of other federally recognized tribes and live with their spouses on trust land within the jurisdiction of their spouses' tribes. The others live within their own tribe's jurisdiction but are employed by the Indian Health Service on land held in trust for another tribe. The State of Oklahoma taxes the income of *Amici* because they do not both live and work within Indian country under the jurisdiction of their own tribes. *Amici* have challenged the state income taxes based on the Indian preemption doctrine, and a decision by the Administrative Law Judge of the Oklahoma Tax Commission in that case is pending.

This Court's application and construction of the Indian preemption doctrine in this case involving state taxation of non-member Indians[2] within Indian country will impact *Amici*'s case. *Amici* thus have a substantial interest in the outcome of the Court's analysis and

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[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of the Brief Amicus Curiae. The consents are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] The term non-member Indian as used in this brief describes Indians within the Indian country of another tribe. The term does not include Indians who are not members of federally recognized tribes.

respectfully submit this brief to assist the Court in properly applying and construing the Indian preemption doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, Blaze Construction Company, Inc., (hereinafter "Blaze"), is a wholly Indian-owned company incorporated under the laws of the Blackfeet Tribe, a federally recognized Indian tribe. Blaze contracted with the Bureau of Indian Affairs to construct and repair reservation roads for six Indian tribes within Arizona. The roads, though public, are located on trust land and primarily serve local Indian communities, providing the Indian residents of the communities access to local tribal government offices, schools, and homes. Petitioner, the State of Arizona ex rel. Arizona Department of Revenue, (hereinafter "State"), seeks to impose a transaction privilege tax on Blaze for the reservation road work. The State seeks to impose this tax even though it provides Blaze with no specific services in connection with road construction and repairs, plays no role in planning or issuing permits for the projects, and provides no maintenance or police protection on the roads. Using the Indian preemption doctrine, a doctrine that ascertains congressional intent by examining the competing interests of the Federal Government, the Tribe and the State, the Arizona Court of Appeals struck down the tax.

The State insists that the Indian preemption doctrine is inapplicable in the present case, however, because the contract for reservation road work was made between the

federal government and a non-member Indian. In the State's view, because the tribe was not a direct party to the contract, there is no direct infringement of tribal sovereignty and hence, this case should be analyzed under preemption principles applicable outside the area of federal Indian law. These non-Indian preemption principles require an express exemption from taxation by Congress, which, the State argues is not present here. The State alternatively argues that even if the Indian preemption doctrine does apply here, the State's taxes on Blaze are not preempted.

The State's position regarding the application of the Indian preemption doctrine is untenable. Under this Court's cases, the Indian preemption doctrine applies to transactions or activities occurring in Indian country, regardless of whether a tribe is a direct party to the underlying transaction or activity. The State here erroneously ignores the critical territorial component that triggers the application of federal Indian law principles such as the Indian preemption doctrine. Moreover, the State's overemphasis on infringement on tribal sovereignty in effect collapses the two independent barriers to state jurisdiction in Indian country – Indian preemption and infringement on tribal sovereignty – into a single test. That is unfounded and directly contrary to this Court's law. Because all relevant activity in the instant case took place within Indian country, the Arizona Court of Appeals was correct in applying the Indian preemption doctrine in the case.

The Court of Appeals was likewise correct in finding the taxes at issue here to be preempted. Pertinent federal

legislation and policies show the important federal interests at stake here: there is a specific comprehensive statutory and regulatory scheme governing reservation road work; federal policy treats all Indians, including non-member Indians such as Blaze, within Indian country equally for purposes of jurisdiction; and federal policy encourages economic development by Indians in Indian country, including development by non-member Indians. These federal policies are bolstered by the fundamental interests of tribes in achieving federally promoted self-government and economic development free from state interference. The State tax here interferes with all of these federal and tribal policies and interests. Significantly, the State provides no direct services in connection with Blaze's road work on the reservations that would justify such interference. The analysis of competing federal, tribal and state interests called for by the Indian preemption doctrine fully supports the Court of Appeals' holding that state taxing jurisdiction in this case is preempted.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE INDIAN COUNTRY PREEMPTION DOCTRINE APPLIES TO THIS CASE, WHICH ARISES IN INDIAN COUNTRY[3]

The State's argument that the Indian preemption doctrine is inapplicable to this case hinges on the fact that no tribe or tribal member was a direct party to the contract for the reservation road work that the State seeks to tax. *See* Pet. Br. at 16; Br. of the United States as Amicus Curiae at 8. While that fact is true, it does not pull this case out from under the Indian preemption doctrine. The Indian preemption doctrine does apply here, because of an overriding and undisputed fact – the existence of

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[3] "Indian country" is the geographic area in which tribal sovereignty generally operates and is defined by statute as follows:

> [t]he term "Indian country," . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same.

18 U.S.C. § 1151. Though the definition is contained in a criminal statute, it applies in the civil context as well. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

Indian country as the geographic area within which the State seeks to impose its tax.

A. Because the State is Attempting to Assert Taxing Jurisdiction Over Activities Taking Place Wholly Within Indian Country, the Indian Preemption Doctrine Applies

This Court has long recognized that the principles of federal Indian law are triggered primarily by the existence of "Indian country," a land base or geographic territory within which "primary jurisdiction . . . rests with the Federal Government and the Indian tribe inhabiting it, and not with the States," *Alaska v. Native Village of Venetie Tribal Government*, 118 S.Ct. 948, 952 n.1 (1998), and within which state jurisdiction "is quite limited." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2, 446 (1975). *See* 18 U.S.C. § 1151. Application of federal Indian law principles within Indian country arises from the tenet that there is a "significant territorial component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). Under the earliest pronouncements of the Supreme Court, Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive" and within which "the laws of [a State] can have no force." *Worcester v. Georgia*, 31 U.S. 515 (6 Pet.) 557, 561 (1832). Although the Supreme Court has since departed from *Worcester's* absolute bar against state jurisdiction within Indian country, this Court continues to recognize that:

> . . . in demarcating the respective spheres of state and tribal authority over Indian reservations . . . Indian tribes are unique aggregations possessing "attributes of sovereignty over both their members *and their territory*" [and that] . . . [b]ecause of their sovereign status, tribes *and their reservation lands* are insulated in some respects by a 'historic immunity from state and local control. . . . "

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (citations omitted) (emphasis added). In short, this Court still firmly recognizes the distinct boundaries of Indian country, and the special jurisdictional rules that apply within that territory.

It is undisputed that the State here is attempting to impose its tax on activities within Indian country, specifically, activities within the boundaries of nine Indian reservations within the State of Arizona: the Navajo, Hopi, Fort Apache, Colorado River, Papago (Tohono O'odham), and San Carlos Indian Reservations. *See* Joint App. at 14-21. Because all activity takes place within Indian country, indeed all takes place on trust land, the principles of federal Indian law are triggered.[4] In this case, the relevant principle of Indian law for determining

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[4] Affirming that the Indian preemption doctrine arises from the territorial component of tribal sovereignty, this Court has stated that "[t]ribal reservations are not states, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other." *Bracker*, 448 U.S. at 143.

state taxing jurisdiction is the Indian preemption doctrine. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).[5]

B. The Lack of a Tribal Party or of a Showing of Direct Infringement on Tribal Sovereignty Does Not Defeat the Application of the Indian Preemption Doctrine

Under federal Indian law principles there are two barriers to the assertion of state jurisdiction within Indian country: "First, the exercise of such authority may be preempted by federal law. . . . Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' " *Bracker*, 448 U.S. at 142 (citations omitted). Although the infringement barrier and the Indian preemption barrier are related, this Court

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[5] Were there no Indian country involved here, the State and the United States would be right in calling for an explicit congressional statement as required under the rules of non-Indian preemption. *See* Pet. Br. at 13-18. For example, even where Indians themselves go outside of Indian country, this Court has held that nondiscriminatory state laws apply absent explicit congressional statements to the contrary. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *Bracker*, 448 U.S. at 144 n.11. *See also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (allowing state income taxes on Indians residing outside of Indian country).

However, where activity takes place within Indian country, this Court has consistently applied the "particularized inquiry" of the Indian preemption doctrine. *See, e.g., Bracker*, 448 U.S. 136 (non-Indian logging company operating within Fort Apache Reservation); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (non-Indian lessees within Jicarilla Apache Reservation).

has admonished that they are two separate and independent barriers to the assertion of state jurisdiction. *See Bracker*, 448 U.S. at 143.

The State misapprehends the separateness of these tests when it argues that the Indian preemption doctrine does not apply because tribal interests are not implicated where only the federal government and a non-member are parties to the contract in question. Pet. Br. at 16. The State's overemphasis on a direct infringement on tribal sovereignty, which in the State's view is absent where the tribe was not a party to the construction contract, in effect merges the two independent barriers to state jurisdiction within Indian country into one test. This approach has already once been firmly rejected by this Court.

As this Court clearly held in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), the doctrine of Indian preemption may invalidate a state tax regardless of a specific showing of direct infringement on tribal interests. In *McClanahan*, the question was whether a state had jurisdiction to tax the income of a Navajo member earning her income and living solely within the boundaries of the Navajo Reservation. The State argued, and the lower court held, that because the taxation fell on the individual, there was no infringement on the tribe's "right to self-government." *McClanahan v. Arizona Tax Comm'n*, 14 Ariz. App. 452, 455 (1971). Based on Indian preemption, this Court reversed. The Court held that even if it were to assume that no infringement on tribal sovereignty occurred, the activity at issue was "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. *Appellee cites us no cases holding that this legislation may be*

ignored simply because tribal self-government has not been infringed." 411 U.S. at 179-180. (emphasis added).

As in *McClanahan*, the State has no support for its argument that Indian preemption does not apply when tribal sovereignty has not been infringed. In the absence of such support, the clear law of this Court that Indian preemption applies where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," controls. *Bracker*, 448 U.S. at 144.

Adoption of the State's argument would require a new test for determining state jurisdiction, one that would focus exclusively on the identity of the parties, and allow state jurisdiction whenever transactions within Indian country concern exclusively non-members. *See* Pet. Br. at 17-18. This suggested test is wholly at odds with prevailing law, and must be rejected. As this Court's recent decision in *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997), makes clear, the identity of the parties does not affect the applicability of federal Indian law principles. In *Strate*, the activity at issue arose within a reservation, however, as the Court noted, regarding the parties to the underlying activity at issue: "[n]either . . . is a member of the . . . Tribe [ ]or an Indian." 117 S.Ct. at 1408. Notwithstanding such facts, this Court applied the usual jurisdictional principles of federal Indian law in that case. In short, the status of the parties as members or non-members, though certainly bearing on the outcome of the case, had little, if any, bearing on the *application* of federal Indian law principles in Strate.

The same result is called for here. The precise principle of federal Indian law that the State seeks to avoid is

Indian preemption, a doctrine to which "[t]he Court has repeatedly acknowledged that . . . [the] . . . geographical component . . . remains highly relevant. . . . " *Bracker*, 448 U.S. at 151. Indian preemption, of course, differs from preemption outside the area of federal Indian law, especially in the area of taxation. *Id.* at 143. Under non-Indian law preemption, states generally may tax unless Congress has expressly provided for a tax exemption. *Id.* at 144. In Indian law, however, an express exemption is not necessary. Rather, courts must make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

By ignoring the "highly relevant" existence of Indian country, the State's proffered rule would replace the balancing test with a flat presumption in favor of state taxation within Indian country, at least where no tribe or tribal members are direct parties to a transaction or activity. This extreme result is not justified when the balancing test is already designed to take into account all of the relevant factors, including the existence of Indian country, the status of the parties, and the relevant governmental interests. The court below properly refused to establish a new, unfounded, and unnecessary test for determining the validity of state taxation in Indian country.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT UNDER THE INDIAN PREEMPTION DOCTRINE, THE TAXES AT ISSUE HERE ARE PREEMPTED

This Court has established a two part test for determining whether state jurisdiction is preempted under the Indian preemption doctrine. First courts must examine whether the assertion of state jurisdiction "interferes or is incompatible with federal and tribal interests reflected in federal law." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). In reviewing the federal and tribal interests, courts must determine whether congressional intent to preempt can be inferred from the language or history of statutes and treaties as well as from the "broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Cotton Petroleum*, 490 U.S. at 176. If there is interference, courts then must look at the state interests at stake to determine whether they are sufficient to justify the assertion of state authority.[6] *New Mexico v. Mescalero*, 462 U.S. at 334. In this case, there are substantial federal and tribal interests with which the asserted tax interferes and there is no justification for that interference.

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[6] In making each of these examinations, this Court has directed that, as in all instances of federal treaties and legislation impacting Indians, treaties and statutes must be "construed generously," *Bracker*, 448 U.S. at 144 and "ambiguities . . . resolved in favor of tribal independence." *Cotton Petroleum*, 490 U.S. at 177.

A. Federal and Tribal Interests

1. A Comprehensive and Exclusive Federal Regulatory Scheme Governs the Activity in Question

As Blaze argues and the Court of Appeals properly held, the road construction activities here are governed by a comprehensive and exclusive regulatory scheme which leaves no room for state taxation. *Amici* support Blaze's position that the statutory and regulatory scheme here is legally indistinguishable from those preemptive schemes involved in *Ramah Navajo School Bd., Inc. v. New Mexico*, 458 U.S. 832 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and incorporate by reference Blaze's arguments on this point. *Amici* do, however, offer further elaboration on the following federal and tribal interests: the federal interest in treating Indians alike in Indian country, the federal interest in protecting Indian property and promoting Indian economic self-sufficiency, and the tribes' interest in governing its territory free from state intrusion.

2. The Federal Government Has an Interest in Treating Indians Alike Within Indian Country, Which Is Thwarted by the Imposition of a State Tax on Blaze, a Non-member Indian Contractor

The federal government has a clear policy, expressed in a wide variety of statutes, to treat Indians within Indian country alike. The Indian Major Crimes Act, 18 U.S.C. § 1153, which provides federal jurisdiction over certain offenses committed by Indians on Indian lands,

applies in the case of "any Indian . . . within the Indian country." 18 U.S.C. § 1153(a). As this Court has held, this specifically includes Indians who belong to "some other tribe" than the tribe on whose land the act was committed. *United States v. Kagama*, 118 U.S. 375, 383 (1886). The Snyder Act, 25 U.S.C. § 13, authorizes the provision of services "for the benefit, care, and assistance of the Indians throughout the United States," irrespective of residence or location. The Indian Reorganization Act of 1934, 25 U.S.C. § 461-479, defines Indian to include "all members of any recognized Indian tribe . . . residing within the present boundaries of any Indian reservation. . . . " 25 U.S.C. § 479. Also, and of particular relevance here, the federal government's interest in treating Indians alike in Indian country is clearly reflected in the Buy Indian Act, 25 U.S.C. § 47.[7] The Buy Indian Act authorizes the Secretary of the Interior to grant preference to Indian contractors for all purchases or contracts made by the Bureau of Indian Affairs (and the Indian Health Service). In granting this preference, absolutely no distinction is made between Indians based on affiliation with a particular tribe. As Congress stated, "Indian preference shall be applied to all Indians regardless of place

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[7] The Buy Indian Act provides in pertinent part:

> So far as may be practicable Indian labor shall be employed, and purchases of the products (including but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior. . . .

25 U.S.C. § 47.

of enrollment. . . . " S. Rep. No. 100-4 (Jan. 27, 1987), *reprinted in* 1987 U.S.C.C.A.N. 66, 83.[8]

The most recent pronouncement of federal policy is found in legislation passed in response to this Court's holding in *Duro v. Reina*, 495 U.S. 676 (1990). In *Duro*, the Supreme Court distinguished between non-member Indians for purposes of determining tribal criminal jurisdiction and held that tribes did not have authority to assert criminal jurisdiction over non-member Indians. Shortly following the *Duro* decision, Congress amended the Indian Civil Rights Act by the Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301-1303 (1997 Supp.)) (hereinafter "ICRA amendments"), to state that " 'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies," 25 U.S.C. § 1301(4), and that "the inherent power of an Indian tribe [is], hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." § 1301(2).[9] These amendments thus affirmed

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[8] This quote was found in the legislative history to the Surface Transportation Assistance Act, P.L. 97-424 (1982), an act which contained language authorizing the BIA to employ Indian preference in awarding contracts pursuant in response to this Court's holding in *Andrus v. Glover Construction Company*, 446 U.S. 608 (1980), that the Secretary of the Interior was barred from granting Indian preference under the Buy Indian Act for prime road construction contracts.

[9] While the amendments were meant to be temporary, they were made permanent by the Act of Oct. 28, 1991, Pub. L. No.

that tribes exercise criminal jurisdiction over all Indians including non-Indians within the Indian country under their jurisdictions.[10]

Following enactment of the ICRA amendments there can be no question of Congress' intent to treat Indians within Indian country alike. The basis for this similar treatment arises from the history of Indians within Indian country. As the legislative history of the ICRA amendment explained:

102-137, 102d Cong., 1st Sess. *See* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am. Indian L.Rev. 109, 117 (1992).

[10] *Amici* recognize that this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), specifically declined to find that the policy of treating all Indians alike as expressed in the Major Crimes Act and the Indian Reorganization Act preempted state taxes on non-member Indians within Indian country. 447 U.S. at 160-161. *Amici* respectfully request this Court to reconsider the effect of these statutes in light of the congressional pronouncements contained in recent legislation which overturned this Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990), and reaffirmed its clear intent to treat member and non-member Indians within Indian country equally for jurisdictional purposes.

This Court has consistently looked to intervening legislation to interpret Indian legislation. *Bryan v. Itasca County*, 426 U.S. 373, 386 (1976) (stating, "we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments"). *See Seymour v. Superintendent*, 368 U.S. 351 (1962) (looking to later congressional enactments to interpret an act purportedly diminishing a reservation); *Moe v. Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479 (1976) (inte ing provisions of the General Allotment Act in light of the later enacted Indian Reorganization Act).

> . . . Federal policy and practice . . . in many instances, established Indian reservations on which several tribes were to be settled under the governance of a single tribal government. . . . Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics. Federally-administered programs and services are provided to Indian people because of their status as Indians, without regard to whether their tribal membership is the same as their reservation residence. The issue of who is an Indian for purposes of Federal law is well-settled as a function of two hundred years of Constitutional and case law and Federal statutes.

H.R. Rep. No. 938, 101st Cong., 2d sess. 133 (1990).

A decision upholding a state tax on Blaze, a wholly Indian owned company incorporated under the laws of the Blackfeet Tribe, where such tax could not be imposed on a tribal member, would violate the federal government's consistent policy to treat all Indians within Indian country alike.[11] There is no basis to distinguish member

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[11] The State, the State's *amici*, including the United States, and Blaze all fail to recognize the importance of Blaze's Indian character to the outcome of this case. Based on *Colville*, a taxing case, these parties incorrectly conclude that non-member *non-Indians* and non-member *Indians* are always treated similarly for taxing purposes. *See* Pet. Br. at 9 n.11; Resp. Br. in Opp. at 2 n.1; Br. of United States as *Amicus Curiae* at 12 n.5. Although in *Colville*, this Court did state that, "[f]or most practical purposes,

and non-member Indians in the taxing context now that *Duro* has been overruled.[12]

[non-member] Indians stand on the same footing as non-Indians resident on the reservation," 447 U.S. at 161, that statement is not applicable here. That statement was made in the context of an infringement analysis and not in the context of a preemption analysis like that the Court is being asked to perform here.

Under an infringement analysis, non-member Indians and non-Indians are treated similarly because the individual's relationship with the tribe is of central importance to the analysis. Under a preemption analysis, however, the question is instead one of congressional intent. Because the basis for the two tests is different, it would be incorrect to import the holding equating non-member Indians and non-Indians to the preemption analysis.

[12] In *Duro*, major factors leading the Court to find that the tribe lacked criminal jurisdiction over non-members were that non-members were not allowed to vote or hold office, or serve on the tribe's jury. 495 U.S. 688. These are also factors that the Court in *Colville* relied on to find that a state's taxing jurisdiction over non-members was the same as it was over non-Indians. 447 U.S. at 161. Through the ICRA amendments Congress has indicated that tribal courts exercise criminal jurisdiction over non-member Indians even where they do not vote or hold office. These factors should carry even less weight in the context of taxing jurisdiction, an aspect of civil jurisdiction. As *Duro* pointed out, having a say in tribal governments is even more important in the criminal arena than in the civil arena because "a far more direct intrusion on personal liberties" is involved. 495 U.S. at 688.

3. The Federal Government Has a Strong Interest in Promoting Indian Economic Development, Which Includes Protecting the Income and Property of Individual Indians Within Indian Country

The policy of the federal government to promote Indian self-sufficiency and economic development is clearly reflected in statute. For instance, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543, states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians . . . will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983). The policy of promoting the economic development of Indians also underlies the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, 455-458e, as well as the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, whose "intent and purpose . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934).

Included in the federal government's policy of promoting the economic development of Indians is the protection of the property and income of individual Indians. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973) (invalidating a state income tax on a tribal member who lived and earned her income on the reservation.);

Bryan v. Itasca County, 426 U.S. 373 (1976) (invalidating personal property tax on mobile home owned by tribal member residing on the reservation); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (invalidating personal property taxes on motor vehicles within reservation). By taxing Blaze, an Indian contractor, the State is diminishing Indian income and property earned wholly within Indian country, in contravention of clear federal policy to promote Indian economic development.

4. The Tribes Have a Significant Interest in Maintaining Their Sovereignty Within Their Territory Free from State Interference

The Supreme Court has clearly articulated that a tribe's interest in maintaining its sovereignty within its territory free from state interference is an interest weighing against state jurisdiction.

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Bracker, 448 U.S. at 151.

Here, the fact that all activity took place, not only within the boundaries of a reservation, but on trust land,

should indeed weigh heavily against state jurisdiction.[13] On such trust land, the tribal governments all exercise substantial jurisdiction, even over non-members. For instance, tribal governments have the inherent authority to tax non-members as one of their powers of self-government. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Tribes also have the right to regulate the use of resources by non-members on trust land within tribal jurisdiction. *Montana v. United States*, 450 U.S. 544, 557 (1981); *New Mexico v. Mescalero Apache*, 462 U.S. at 337 (explaining that tribal jurisdiction to regulate resources is also reflected in several federal statutes). Also, tribal courts have jurisdiction over non-members – even for criminal purposes in the case of non-member Indians. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978); ICRA amendments, *supra*.

In addition to the general interest that the tribes have in exercising jurisdiction over Indian country, the tribes

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[13] Here, not only did the activity take place within reservation boundaries, it took place on tribal trust land or on BIA roads. *Arizona v. Blaze Constr. Co.*, 947 P.2d 836, 837 (Ariz. Ct. App. 1997). This Court indicated in *Bracker*, that BIA roads are considered the equivalent of trust land, stating "[f]or purposes of federal pre-emption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs." 448 U.S. at 148 n.14. None of the activity here took place on private, non-Indian land, or even on land "equivalent" to non-Indian land. *Cf. Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 (1997) (noting that for purposes of tribal jurisdiction over non-Indians, a right-of-way granted to a state for a state highway, is "equivalent . . . to alienated, non-Indian land").

here have a significant interest in the particular road building activity sought to be taxed. The roads are all built on reservation land, with pertinent rights-of-way being granted under and governed by 25 C.F.R. Pt. 169, which requires consent of the affected tribe. Certainly, the Tribes in question have an interest in the infrastructure on their reservations, including that involving roads. As Blaze pointed out below, such roads "make school bus rides safer for Indian children, provide Indians with access to health care and social services, and encourage participation in Tribal governments. The road program also provides jobs and revenue for tribal governments, and the roads encourage economic development." Appellant/Defendant's Opening Brief, at 18, *Arizona v. Blaze Constr. Co., Inc.*, 947 P.2d 836 (Ariz. Ct. App. 1997) (No. 1 CA-TX 96-0010). The proposed tax here will deplete the funds available for the building and repairing of reservation roads. As case law has shown, such an impact is an impact on tribal interests that this Court should consider. *See Bracker*, 448 U.S. at 150 (finding that a state tax would diminish Tribes' revenues "and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses."); *Ramah*, 458 U.S. at 842 (finding that a state tax would deplete the "funds available for the construction of Indian schools.").

B. There is No Significant State Interest to Justify Taxing Jurisdiction

As this Court has held, "any applicable regulatory interest of the State" must be considered in an Indian

preemption analysis. *Bracker*, 448 U.S. at 144. In particular, "[t]he State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight." *Ramah*, 458 U.S. at 838. State interests are examined once a finding is made that the state's asserted regulation, or tax, interferes with federal and tribal interests in order to determine whether there is justification for the interference. By the State's own admission, a finding of interference with federal or tribal interests gives rise to a requirement that there be "corresponding" state services to justify state taxation. Pet. Br. at 21.[14]

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[14] Where there is no interference with federal and tribal interests, the burden on the state to justify state taxes or regulations is greatly reduced. Both *Colville* and *Cotton Petroleum* demonstrate this reduced burden. In both of those cases, the Court first examined whether there were federal or tribal interests in having the activities in question exempted from taxation and found such interests to be lacking. In *Colville*, the Court characterized the activity involved as marketing of a tax exemption and explicitly held that no federal statute or principle of federal Indian law supported or showed an interest in such marketing. In that context, the Court held that the state interest in "preventing the tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations" and who receive state services, was sufficient. 447 U.S. at 157. *See also Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (likewise involving tax exemption for on-reservation cigarette sales).

In *Cotton Petroleum*, the activity in question was the production of oil and gas by non-Indian lessees. In examining federal and tribal interests, the Court first looked to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a et seq. and found

The State argues, however, that there is no interference here, and even assuming interference, that the corresponding state services do not need to be direct services. Pet. Br. at 21-25. The State is wrong on both points. As the Court of Appeals properly held, and as this and Blaze's briefs show, there is interference with federal and tribal interests. In the face of this interference, the only remaining question is whether direct state services are required to justify the imposition of a state tax.

Decisions of this Court have consistently held that the state interests that are to be considered in an Indian preemption analysis are those that are directly related to the activity sought to be taxed.

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that it contained no indication that Congress intended to preempt taxation on oil production by lessees. 490 U.S. at 177-180. Looking for historical indications, the Court found an explicit history of Congressional *authorization* of state taxation of oil and gas production on reservations, not exemption. *Id.* at 181 (referencing the Indian Oil Leasing Act of 1924, 43 Stat. 244, 25 U.S.C. § 398). Finally, the Court examined whether the comprehensive federal regulatory scheme had preemptive effect and held that it did not, mainly because the federal scheme was not exclusive but existed concurrently with the state scheme. Because the Court in the first instance found no preemptive federal interest, it did not look substantially into services provided by the state. Even still, the Court did note that the state did provide some direct services and had some direct regulatory interest in the activity being taxed, pointing out that the state provided "substantial services" and "regulate[d] the spacing and mechanical integrity of wells located on the reservation." 490 U.S. at 185-186. The Court summarized by stating that "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." 490 U.S. at 186.

In *Bracker*, the Supreme Court first articulated that a state's "generalized interest in raising revenue" would not be sufficient to justify interference with federal and tribal interests. Rather the Court would require more narrowly tailored services or interests. For instance, in *Ramah*, where the question was the state's jurisdiction to tax a non-Indian construction company building an on-reservation school for Indian children, the Court examined whether the state had taken "any responsibility for the education of these Indian children." 458 U.S. at 843. Noting that it hadn't, the Court also questioned whether any of the state interests, as reflected by state services were "in any way related to the construction of schools on Indian land." *Id.* at 845, n.10. The Court explicitly declined to consider any of the services that the state had provided outside of the context of Indian education or school construction, such as off-reservation services. *Id.* at 844 and n.9.

In *New Mexico v. Mescalero Apache*, an analogous case, the question was whether federal law preempted concurrent state regulations of hunting and fishing by non-members on reservation land. The state interests the Court looked to for justification of state regulatory power, even off-reservation interests, were all directly and narrowly related to hunting and fishing. For instance, the Court noted that the state did not contribute to the stocking or maintenance of the reservation wildlife resources. 462 U.S. at 342. Also, the Court looked to whether game wandering off-reservation, or interest in raising revenue through hunting and fishing licenses would give rise to justification for state regulation and found that it did not. *Id.* Specifically, the Court noted that "the State has

pointed to no services it has performed in connection with hunting and fishing by nonmembers. . . . " *Id.* at 343.

No case law has ever refuted the rule that a state must show services or interests directly related to the activity in question in order to justify taxation of activities within Indian country where taxation would interfere with federal and tribal interests. The State's assertion that *Cotton Petroleum* is such a case is incorrect. The State erroneously misapplies *Cotton Petroleum* to support its position. The State asserts that "*Cotton Petroleum* specifically rejected the notion that there must be a *quid pro quo* relationship between a taxpayer and the State." Pet. Br. at 23. However, this principle has no applicability to this case where the very existence of state taxing is what is at issue. Certainly, once it is found that a state has taxing jurisdiction, there needs to be no showing of proportionality between taxes paid and services received as *Cotton Petroleum* held. 490 U.S. at 185 n.15. Where the issue is the existence of state taxing jurisdiction itself, however, *Bracker* and *Ramah* explain that States must show state services or interests directly related to the taxed activity or individual in order to justify the assertion of state jurisdiction. *Cotton Petroleum* in no way undermines these cases.[15]

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[15] In addition, the State relies on the statement in *Cotton Petroleum* that, " 'the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it' " as support for its argument against direct services. Pet. Br. at 23. This reliance is wholly misplaced, however. Quite clearly, the Court looked to off-reservation services only in its analysis of the Indian commerce clause and not in the Indian preemption analysis. Importing principles from one analysis to others is incorrect and unhelpful.

The State can point to no services which would justify the interference with the federal and tribal interests that its tax inflicts. Indeed, this is a case where the state has had "nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 163 (1989). In the absence of the required justification, the State lacks jurisdiction to tax the activity here.

CONCLUSION

For the reasons stated above, the decision of the Arizona Court of Appeals that the state taxes are preempted here should be affirmed.

Respectfully submitted,

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August 1998